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THE

Weekly Reporter:

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE CALCUTTA AND MOFUSSIL SMALL CAUSE COURTS AND THE RECORDERS' COURTS; TOGETHER WITH RULES AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT, AND CIRCULAR ORDERS OF THE BOARD OF REVENUE; ALSO DECISIONS OF HER MAJESTY'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

BY D. SUTHERLAND,
MIDDLE TEMPLE.

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Held, firstly, that, if such a transfer were valid, it would not amount to a cession of British territory to a Native State, but would merely amount to a transfer of certain territories from ordinary British to a special local jurisdiction; but, *secondly*, that the transfer in the present case, which was alleged to have been effected by sundry notifications in Government Gazettes, was not valid, because even such a transfer as was contemplated could not legally be effected without a Legislative Act, such as had not been passed in this case. *Held* also that as the Governor-General in Council is precluded from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, no Legislative Act, purporting to make a Government notification conclusive evidence of a cession of territory, could exclude a judicial enquiry as to the nature and lawfulness of any such alleged cession. *Held* also that the jurisdiction

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Where, however, some of the interests in question were covered by a zur-i-peshgee mortgage, and the exact nature of the lien thus created had not been fully explained in the trial, *held* that the surviving member could not recover his interests until he had satisfied this lien:

And where, in the same suit, the objection was taken that the claim would not stand because of a defect in the frame of the suit, whereby a co-sharer in the joint family property was not made a party to the suit, *held* that as the said co-sharer had previously been put in possession of his moiety of the property, and had put in a waiver of all further claims, and no further claimant could possibly arise, the plaintiff's suit was not prejudiced by the defect:

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CIVIL RULINGS.

The 4th November 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Questions of Fact—Appeal to Privy Council.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Rajah Jugojeebun Lall Dhubal Deb

versus

Kartick Chunder Bondopadhya (now Chunder Churn Banerjee).

Their Lordships refused to reverse a decision of the High Court upon a question of fact in which that Court had before it the documents and the evidence of the witnesses, and had an opportunity of judging of the demeanour of the witnesses.

THIS was a suit upon a bond, the execution of which was denied by the defendant, and the sole question was whether the document was a genuine one or not. The Court of first instance found that it was genuine. The High Court, upon appeal, came to the conclusion that the evidence was not sufficient to establish its genuineness, and reversed the decision of the Court below. But subsequently the plaintiff produced further evidence—evidence of a character which, if true, would be conclusive, namely, of an admission of the defendant—and sought for a review upon this new evidence. The High Court granted that review, and upon that new evidence, and further upon examination of both the parties, they came to the clear conclusion that the bond was genuine. The appeal is against that decision. Their Lordships are asked to reverse a decision of the High Court upon a question of fact, in which the High Court had the documents and had the evidence of the witnesses before them, and had an opportunity, which of course their Lordships have not, of judging of the demeanour of the witnesses on both sides.

Under these circumstances their Lordships are of opinion that the decision of the High Court ought not to be reversed. They will humbly advise Her Majesty to confirm that decision, and to dismiss this appeal.

* From the judgment of Bayley and Mitter, JJ., decided on the 16th May 1868.

The 17th November 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Act VIII. of 1859, s. 2—Cause of Action—Adjudicated Issues.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Krishna Behari Roy

versus

Bunwari Lall Roy (now Brojeswari Chowdhranee) and another.

The expression "cause of action" in Act VIII. of 1859, s. 2, cannot be taken in its literal and most restricted sense. Where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot be again tried in another suit between them.

THIS was a suit brought by the appellant, claiming to be the heir of Goursoonder Roy, to set aside an adoption of the respondent,

* From the judgment of Kemp and Glover, JJ., decided on the 4th January 1873.

Bunwari Lall, alleged to have been made by the widow of Goursoonder Roy. One of the defences set up by Bunwari Lall and by his mother, who was joined in the suit as defendant, was that the question of the validity of the adoption of Bunwari Lall had been already decided in a former suit to which the present appellant Krishna Behari Roy was a party. An issue was raised upon that defence. Now, it appears that a former suit had occurred, which was of this nature: Bunwari Lall had brought an action against some putneedars who claimed under putnee leases granted by his adoptive mother. The ground on which he sought to set aside the leases was that she had exceeded her power in granting them, inasmuch as she had only a widow's estate. It is not necessary to state more respecting the object of that suit. An issue was raised in it upon the question whether Bunwari Lall had been validly adopted. The present appellant and plaintiff, Krishna Behari Roy, intervened in that suit, upon the ground that he was the heir of Goursoonder Roy, and, as the heir, had a right to intervene to dispute the title of Bunwari Lall as his adopted son. It does not appear very clearly at what period of the suit that issue was raised—whether before or after Krishna Behari Roy intervened—but undoubtedly it was raised, and is in substance the same as the issue raised in the present suit. The issue was tried, and the Principal Sudder Ameen found against the intervenor and in favour of the adoption. He also found in favour of the putneedar that the putnee could not be set aside. The putneedar having a decision in his favour was of course satisfied with that decree, but Krishna Behari Roy, being dissatisfied with the finding upon the issue as to the adoption, appealed to the Civil Judge. On this appeal, the decision of the Principal Sudder Ameen was affirmed. Again he appealed from the Civil Judge to the High Court, which, after fully hearing the case upon the issue of adoption, affirmed the decisions of the Courts below. There exists, therefore, a final and complete judgment upon the issue raised either at the instance of Krishna Behari Roy or which he adopted on the very question which he seeks again to raise in this suit.

Both the Courts below have held that the present suit is barred by reason of the judgment in the former one. The ground of the present appeal is that they are wrong, inasmuch as it is said that the case does not come within section 2 of Act VIII. of 1859. Now the section is this: "The "Civil Courts shall not take cognizance of "any suit brought on a cause of action "which shall have been heard and deter-"mined by a Court of competent jurisdiction "in a former suit between the same parties "or between parties under whom they "claim." Their Lordships are of opinion that the expression "cause of action" cannot be taken in its literal and most restricted sense. But however that may be, by the general law, where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them.

It is not necessary for their Lordships to go at length into the reasons for their decision, because those reasons appear in a recent judgment of this Board in the case of Soorjomonee Dayee *vs.* Suddanund Mohapatter. In that judgment it is said after reference to the second clause of Act VIII.: "Their Lordships are of opinion that the "term 'cause of action' is to be construed "with reference rather to the substance "than to the form of action, and they are "of opinion that in this case the cause of "action was in substance to declare the will "invalid on the ground of the want of "power of the testator to devise the pro-"perty he dealt with. But, even if this "interpretation were not correct, their Lord-"ships are of opinion that this clause in the "Code of Civil Procedure would by no means "prevent the operation of the general law "relating to *res judicata* founded on the "principle, '*Nemo debet bis vexari pro eadem* "*causâ*.' This law has been laid down by "a series of cases in this country with "which the profession is familiar. It has "probably never been better laid down "than in a case which was referred to in the "3rd volume of Atkyns—Gregory *vs.* Moles-"worth—in which Lord Hardwicke held "that where a question was necessarily "decided in effect, though not in express "terms, between parties to the suit, they "could not raise the same question as between "themselves in any other suit in any other "form; and that decision has been followed "by a long course of decisions, the greater "part of which will be found noticed in the "very able notes of Mr. Smith to the case of "the Duchess of Kingston."

A decision of the High Court of Bengal

has been referred to, the case of Sheikh Rahmatulla *vs.* Sheikh Sariutulla Kagghi in the 1st Bengal Law Reports, page 68, as having a contrary tendency. All their Lordships desire to say of it is that, as reported, it does not appear to be consistent with their judgment in the former appeal to which I have referred, nor with their opinion in the present case. The decision is of so recent a date that they desire to say no more upon it.

On reference to some notes of Mr. Broughton on this section of Act VIII. of 1859, it appears that the decisions have not been uniform in the Courts in India. Several of them are opposed to that referred to.

It was suggested by Mr. Cave that the former judgment ought not to be binding, because, certain witnesses having been examined before the present appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any miscarriage of that kind, the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals which were successively made in that suit to the Civil Judge and to the High Court; but, whether it was so raised or not, their Lordships think that they cannot affect the operation of the final judgment, which must be taken to have been rightly given.

In the result, their Lordships will humbly advise Her Majesty to dismiss this appeal, and to affirm the judgments below with costs.

The 19th November 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Mistake in Settlement Papers—Tenants not concluded—Reg. XXV. of 1802—Grants before Permanent Settlement—Objections.

On Appeal from the High Court of Judicature at Madras.

Stri Raja Vyricherla Raz Bahadoor

versus

Nadiminti Bagavat Sastri.

Tenants are not concluded by a mistake in settlement-papers, nor does Regulation XXV. of 1802 provide for forfeiture of rights by parties who, by carelessness or accident, allow their land to be misdescribed in settlement proceedings.

Whether grants made by a zemindar before permanent settlement are, or are not, binding on his successors—their Lordships' minds inclining strongly to the affirmative side of the alternative—as the question was not raised in the Courts below, it was not considered to be open to the appellants in the appeal to the Privy Council.

THE question to be determined on this appeal is whether the appellant, the zemindar of Kurupan, is entitled to turn the respondents, who are certain Brahmins claiming to have an agraharum tenure in the village of Turakanayuduvalasa, out of possession of that village, and to recover the mesne-profits from the time specified in the plaint. The case of the plaintiff is thus stated in the 9th paragraph of the plaint. He there says: "In "the year 1857 I attained my majority, and "took charge of the zemindary. The said "village was until then enjoyed as a jeroyti "portion of my zemindary for many years, "and was severed therefrom only in the "year 1857. It is therefore prayed that the "Court may adjudge to me the jeroyti vil-"lage of Turakanayuduvalasa (situated with-"in the boundaries hereunder specified, and "yielding at present an annual income of "Rs. 1,000), together with the produce "made over to the defendant by the Court, "as also the produce subsequently enjoyed "by him, with interest thereon, amounting "to Rs. 39,577-13-4, as per schedule." The plaint therefore treats the restoration of possession to the defendants under a former decree of which the execution was in 1855 directed by the Sudder Court to be made as a species of trespass. It seeks to re-open the settlement of account made by, or in conformity with, that decree; and to recover back the sum then paid with subsequent mesne-profits. The suit is brought, not upon any notice to determine an alleged tenancy-at-will, but as upon an act of trespass giving a right of action from a particular time. It is difficult to reconcile such a claim with the admitted facts of the case, or to see how, upon any view of the evidence in the cause, the plaintiff could obtain the particular relief which he has prayed for.

It is not their Lordships' intention to follow Mr. Mayne through that wilderness of litigation in which they have been very clearly guided by him; the history of which does not present by any means a favourable picture of the administration of justice in the Presidency of Madras (or at all events in the district of Vizagapatam) during the greater part of the present century. It may be necessary hereafter to refer to some of those

proceedings which have a peculiar bearing upon the points raised by the present appeal. It is sufficient, however, for the present to observe that in 1861, when the former decree above referred to was finally executed, there was, as it were, a new point of departure.

The Brahmins were then reinstated, under the authority of the Court, in possession of their village, and recovered a certain portion of the mesne-profits received by the zemindar after the estate had been made over to him upon the taking off of the zuft or attachment. The zemindar, on the other hand, was left to assert what rights he had to impeach this agraharum tenure in a new and independent suit; and this suit, which was commenced in 1864, has been treated in the Courts below, and may here be treated, as one brought for that purpose. Nor again is it necessary to consider in detail the earlier stages of this new litigation, or in particular the proceedings in which his right, whatever it might be, was held to be barred by the decree obtained in 1807, because the High Court, having rejected that view of the case, and also departed from the view which it had itself originally entertained to the effect that the suit was barred by the Statute of Limitations, finally, by the order of the 26th of March 1866, sent the parties back to trial on these two issues, *viz.*, *1st*, "Whether the "defendant at the date of the suit held the "village in question under the grant made "to his ancestor before the date of the per-"manent settlement?" and, *2nd*, "Whether "the defendants' holding under such grant "was kattubadi or other tenure, subject to a "fixed quit-rent which the plaintiff could not "legally determine?"

Now, as the case comes before their Lordships, those two issues have been found by the two Indian Courts, which last dealt with them, in favour of the plaintiff. Therefore, so far as they are findings upon matters of fact, they are findings which this tribunal, in accordance with its ordinary rule, will not be disposed to question. As to the first issue, Mr. Mayne, in the course of his able argument, was almost constrained to admit that he could not impeach the correctness of it. The evidence upon which the Court came to its conclusion on the first issue depended in part upon two documents of which the genuineness had been contested, but which both Courts have found to be genuine—I mean the dombala of Mr. Webb on the 20th May 1800, which clearly treated the village as then held as an agraharum by the Brahmins, and directed that it should be relinquished to him on his paying the customary yearly shrotrium to the zemindar of Kurupam of Rs. 150. That was followed by a putta, also found to be genuine, whereby the then zemindar, or his guardian in his name, stated that, "as my ancestors have granted "to you the agraharum of Turakanayudu-"valasa, attached to our jaghir of Kuru-"pam Taluk, I again grant it to you as "ekabhogam (entirely) in the name of Shri "Swami, fixing a shrotrium (revenue) of "Rs. 150. Therefore you and your descend-"ants may extensively improve and enjoy "it, paying the shrotrium (revenue) every "year, and bestowing blessings upon us. "He who maintains what another gives "gains a virtue double that he gets by giv-"ing it himself."

It seems to their Lordships that the Court finding those documents to be genuine have rightly come to the conclusion that they establish the affirmative of the issue in favour of the plaintiff; that, whatever may have been the original grant of which the first seems to have been a grant absolutely rent-free to the Brahmins, it must be taken that, in some way or another, the rights of the Brahmins had become modified to that extent; that they were to hold this village only subject to the payment of the shrotrium or fixed rent of Rs. 150; and that that was the state of things in 1800, and before the completion of the perpetual settlement of the zemindary.

That being so, the only question that would remain would be whether the Court, finding that, was correct in coming, from that conclusion and upon the other evidence in the cause, to its finding on the second issue, "that the defendant's holding under "that grant was kattubadi, or other tenure "subject to a fixed quit-rent, which the "plaintiff could not legally determine."

The principal ground upon which the correctness of that finding has been attacked is, that it is conclusively shown by the lists of the zemindary property upon which the perpetual settlement was made, that the village was entered in those lists, and must therefore have been treated in the settlement made upon them as a jeroyti village, and not as a shrotrium or agraharum village. That raises the question, what is the effect of a mistake in this description of the village upon the second issue raised in this cause. That there was, in the proper sense of the term, a mistake is reasonable to conclude from the dombala of Mr. Webb, because Mr. Webb appears to have been the Collector

who was taking a large, if not the sole, part in making the permanent settlement; and if he in 1800 was satisfied that this was a shrotrium village, and directed that, as a shrotrium village, it should be delivered over to the Brahmins, he would hardly proceed, consciously or intentionally, to enter it as a jeroyti village in the settlement. But, however that may be, the question is, what is the effect of the entry upon the interest of the holders of an agraharum tenure. Their Lordships cannot find any authority for saying that it is conclusive against the rights of the tenants. They were not necessarily parties to the proceedings which resulted in the settlement between the zemindar and the Government. It may be conceived that the Brahmins, as they said they were in fact, though the evidence does not support their allegation, might have been absent whilst the proceedings were pending. There seems to be nothing in the Regulations, as their Lordships read them, which would so conclude them. No doubt, if the village had been entered as a shrotrium village in the settlement-papers, that would have been conclusive as to the rights of the Brahmins against the zemindar, against the Government, against any purchaser at a sale for arrears of revenue, and in fact against all the world. But the Settlement Regulation XXV. of 1802 does not contain anything which says that, if the parties, by carelessness or by accident, allow their village to be misdescribed, they are to forfeit their rights. It does not even say that all the shrotrium grants which then existed, and which were to be protected against future enhancement, were to be registered; and, on the other hand, that Regulation is followed by a subsequent Regulation of 1822, which declares that the provisions of the former Regulation were not meant to define, limit, infringe, or destroy the actual rights of any description of landlords or tenants, but merely to point out in what way the tenants might be proceeded against in the event of their not paying the rents justly due from them, leaving them to recover their rights infringed, with full costs and damages, in the Courts of justice. It cannot be said that, as a matter of law and of right, the parties have forfeited the interest which they would otherwise have in this tenure by reason of the misdescription of the village in the settlement-papers.

It has, however, been argued by Mr. Mayne that the insertion of the village as a jeroyti village at least affords the strongest presumption that the parties then knew that they had not a good agraharum, and of their acquiescence in that description as correct; but that presumption seems to their Lordships to be rebutted by all that subsequently took place. They were first dispossessed some short time after the settlement in 1807. They immediately asserted their rights, and the decision of the Court, so far as it went, was in their favour. The effect of it was that the zemindar had taken possession of the village forcibly, or at all events not under a judicial decision; and that, according to the law as laid down in the Regulations, the only way in which he could interfere with the right claimed by the Brahmins was by a regular suit. Accordingly the Brahmins were again put into possession. The zemindars for the time being seem to have acquiesced for nearly 20 years in that decision; and but for the decisions in India, by which it has been ruled that questions between landlord and tenant, and particularly questions of enhancement of rent, are not within the operation of the Statute of Limitations, there would have been no answer whatever to the proposition that the right of re-entry of the zemindar, if it had ever existed, had been barred by lapse of time.

Their Lordships are therefore of opinion that both the issues have properly been found in favour of the defendant.

There remains to be noticed the further question which was raised by Mr. Mayne, *viz.*, that these grants were, at most, grants by the zemindar, which could take effect only during the life of the particular zemindar, and, unless affirmed by his successor, were voidable. Whether, assuming that proposition to be correct, the particular suit, as it is framed, could have been supported may well be doubted. But their Lordships have already intimated their opinion that this point, which was not taken in the present suit in the Courts below, is not open to Mr. Mayne upon the present appeal. They will not therefore say more upon it than that it would have required strong authority to convince them that grants made by a zemindar before the estate was permanently settled, and became subject to the rules which may have been laid down in the Madras Regulations as to subsequent alienations of this kind, were not binding upon the successors of the grantor.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, which is the subject of the present appeal, and to dismiss the appeal with costs.

The 24th November 1875.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Confirmation of Possession—Onus Probandi.

Case No. 1041 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 12th February 1874, reversing a decision of the Sudder Moonsiff of that District, dated the 10th July 1872.

Sansar Roy (Plaintiff), *Appellant,*

versus

Indrasun Roy and others (Defendants), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Baboos Chunder Madhub Ghose and *Huree Hur Nath* for Respondent.

A plaintiff who comes into Court alleging possession, and that that possession has been threatened by the acts of the defendant, and asking for confirmation of that possession, is bound to prove that he is in possession.

Kemp, J.—We do not consider it necessary to hear the respondents' pleader in this case. The plaintiff's suit, as he chose to frame it, was that he was in possession of 20 beeghas of land; and that the defendants had in a criminal suit asserted that they had the kashtkaree rights in those lands; that the criminal suit was disposed of without any adjudication of the right of either party; that guards were appointed to look after and protect the crops of the disputed lands, but that the defendants, without any right to the crops, forcibly carried them away; that, by this conduct on their part, the plaintiff's possession has been interrupted, and injury accrued to him. He therefore brings this suit, and prays that his possession of the land in suit may be confirmed. The written statements of the defendants are to the effect that they are in possession of the lands in dispute, and that the plaintiff is not in possession; and that this is an attempt, on the part of the plaintiff, to recover possession of land to which his claim of right has already been dismissed in a former suit. The first Court gave the plaintiff a decree; the second Court reversed that decision. The Subordinate Judge says that he has carefully gone through the evidence; that he has inspected the land and examined independent witnesses on the spot; that amongst the witnesses examined was the patwaree of the village; and that he has come to the conclusion that the plaintiff is not in possession. It is true that he goes on to say that this is an endeavour, on the part of the plaintiff, to obtain possession of 901 beeghas of land called *cheragah*, respecting which his former suit had been dismissed; but the Subordinate Judge also says that the plaintiff's possession of the 20 beeghas has not been proved, and he gives his reasons for this finding, namely, that the plaintiff has not filed the jummabundee papers of these lands, and that the patwaree and the other witnesses examined on the spot established the defendants' possession over these 20 beeghas. Again, in the latter portion of his decision, he says that "in the face of the positive evidence of the "patwaree and the neighbouring ryots who "have sworn to the ingenuity of the plaintiff "having sued for the same land in part, for "the integral of which his former suit failed," and of the fact that he distrusted the evidence of the plaintiff's witnesses, alleging the plaintiff's possession, and alleging opposition offered to him; and, further, of the fact that he found no guards on the spot when he visited the disputed land, he came to the conclusion that the defendants are in possession of the 20 beeghas, the subject of suit; that the plaintiff had not made out that the defendants threatened to disturb his possession, which is the ground on which he prayed for a declaration of title, and therefore that no adjudication of title was necessary; that the plaintiff's course is to sue for possession by investigation of title, if he has any.

We think there has been a clear finding in this case. The plaintiff who came into Court, alleging that he was in possession, and that that possession had been threatened by the acts of the defendants, and asking for confirmation of that possession, was bound to prove that he was in possession. The Court below has found on a question of fact on the evidence that the defendants are in possession of the disputed lands, and not the plaintiff, and has, therefore, refused to confirm the alleged title of the plaintiff, leaving him to sue in an ejectment-suit to establish his title.

We dismiss the special appeal with costs.

The 30th November 1875.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Mortgage—Security—Appeal—Objections.

Case No. 2672 of 1874.

Special Appeal from a decision passed by the Judge of Sarun, dated the 6th July 1874, reversing a decision of the Moonsiff of Champarun, dated the 30th May 1873.

Pitambur Misser (one of the Defendants), *Appellant,*

versus

Ram Surun Sookool (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Nil Madhub Bose for Respondent.

Where a mortgagee was deprived by the wrongful acts of the mortgagor of a portion of the land which constituted the only security for the mortgage-loan, HELD that he was entitled to recover from the mortgagor so much of the consideration-money as was in proportion to the land of which he had been deprived.

An objection not taken in the grounds of appeal cannot be entertained at the hearing.

In this case the plaintiff sued, alleging that his father obtained a zur-i-peshgee lease from Pitambur Misser and Khoosul; the term of the lease being up to 1281 F.S. in respect of 7 beeghas 5 cottahs of land situated in Mouzah Mohanundpore, the jumma payable being Rs. 17-12, and the consideration Rs. 143; that, subsequent to this transaction, Ghureeb Misser, the brother of plaintiff's father's lessor, Pitambur Misser, sued claiming 11 cottahs of land out of the 7 beeghas 5 cottahs for which the zur-i-peshgee lease had been granted to the plaintiff; that the suit of Ghureeb Misser was decreed, and the plaintiff was saddled with the payment of wassilat, as also costs; and that, in execution of that decree, Ghureeb Misser obtained possession of the 11 cottahs subject of that suit, and thus deprived the plaintiff of possession. The plaintiff therefore brings this suit to recover so much of the Rs. 143 consideration-money as is covered by the 11 cottahs of land of which he has been deprived in execution of the decree of Ghureeb Misser. He also sues for recovery of the wassilat which he had to pay in the suit of Ghureeb Misser, and the costs of the same suit.

The issues laid down in the first Court were, *1st*, whether the plaintiff, owing to his being dispossessed of a portion of the mortgaged property, is entitled to get a refund of the mortgage-money in proportion to that share or not, and whether consideration passed in respect of the mortgage, a portion of which consideration-money the plaintiff asks to have refunded to him; and, *2nd*, whether the plaintiff is entitled to receive from the defendant No. 1 in this suit the mesne-profits and costs which he had to pay in the suit of Ghureeb Misser. The Moonsiff declined to enter into the question whether consideration passed or not, inasmuch as the suit being for a small portion of the consideration-money, it did not seem proper to the Moonsiff to inquire whether any consideration passed or not. He also held that, as the zur-i-peshgee transaction was joint in respect of the 7 beeghas 5 cottahs, the debt was also joint; and as in the former decision, that is to say, the decision between Ghureeb Misser as plaintiff and the present plaintiff as defendant, it had been held that the 7 beeghas 5 cottahs of land pledged consisted of several kinds of cultivation, therefore it was impossible under the circumstances to ascertain what amount of interest the plaintiff was deprived of on account of the 11 cottahs of land which went out of the possession of the plaintiff, and, in consideration of it, what amount of mortgage-money ought to be refunded. The Moonsiff, therefore, held that the plaintiff's claim for a refund of Rs. 10-15 could not be allowed, and further that the plaintiff could not receive the mesne-profits claimed, because the plaintiff had to pay these mesne-profits on account of his being found in wrongful possession of the 11 cottahs, subject of that suit. Then, with reference to the question of costs, the Moonsiff says that it was entirely in the discretion of the plaintiff to appear in the suit brought by Ghureeb Misser, or not to appear, and therefore, if he chose to appear and has been saddled with the costs, he is liable for the same. He therefore dismissed the plaintiff's suit.

This decision has, in my opinion, been very properly reversed by the Judge. The Judge has held that consideration passed, and that the plaintiff had been deprived of 11 cottahs of land out of the property which was mortgaged to his father on an advance of Rs. 143 by the fraudulent conduct

of the mortgagor Pitambur. The Judge says that the plaintiff was put in possession by the defendant of certain lands as security for a certain loan; that a part of this land turns out not to have been the property of the defendant who pledged it, and the plaintiff consequently has to stand a suit by the rightful owner, in which he is cast in costs, and has to make good the mesne-profits, and also to give up the land; that all this has been brought upon the plaintiff by no fault of his own, but solely by the fraud of the first defendant, and, in addition to all this, the Judge remarks that the plaintiff is left in possession of 11 cottahs of land less than he is entitled to as security for his loan. Further, the Judge says that he sees no fairer way of arriving at the amount which the plaintiff is entitled to recover than by dividing the amount lent on the land pledged equally, having regard to the area of that land, and that, dividing it in that way, the plaintiff is entitled to the sum claimed by him in proportion to the 11 cottahs of land from which he has been dispossessed.

The main points taken in special appeal are, first, that the plaintiff's suit in its present shape ought not to have been entertained, inasmuch as this being an usufructuary mortgage, if the plaintiff has been deprived of any of the lands, subject of the mortgage, and which represented the security for the amount advanced by him, he is at liberty, at the end of the lease which does not expire until 1281, if that sum is not satisfied, to hold on until he is satisfied from the profits of the mortgaged property. The next objection taken is that the principle of calculation adopted by the Judge is not a sound one, inasmuch as it has been held in the former suit that the lands are not all of the same description, but that they vary both in quality and value. With reference to the last objection, which is a specious one, I may observe that it is not taken in the grounds of appeal, and it cannot therefore be entertained now. With reference to the first contention, I think it is very clear that the plaintiff is entitled to recover the sum claimed by him. The land which was mortgaged to him was the only security which he had for the repayment of the money advanced; it is admitted that Rs. 143 were advanced upon 7 beeghas 5 cottahs of land; it is also admitted that the plaintiff has been deprived by the acts of the mortgagor of a portion of the land which represents the security he has for his loan, and he is entitled to recover from the mortgagor, special appellant, a sum in proportion to the lands of which he has thus been deprived by the wrongful act of the said defendant, special appellant.

The special appeal is, therefore, dismissed with costs.

The 1st December 1875.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Voluntary Payments in Excess of Rent—Exactions—Act X. of 1859, s. 10.

Case No. 3156 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 21st August 1874, affirming a decision of the Subordinate Judge of that District, dated the 5th May 1873.

Nobin Chunder Roy Chowdhry (Plaintiff), *Appellant,*

versus

Gooroo Gobind Mojoomdar and others (Defendants), *Respondents.*

Baboos Mohinee Mohun Roy and *Girjah Sunkur Mojoomdar* for Appellant.

Baboos Kishen Dyal Roy and *Tarinee Kant Bhuttacharjee* for Respondents.

A tehsildar is bound to account to the landlord for payments made to him by tenants in excess of the rents due from them, if made voluntarily. Sums "exacted" by the tehsildar within the meaning of Act X. of 1859, s. 10, could not be recovered by the landlord in a civil suit.

Macpherson, J.—This case must be remanded to the first Court to be tried *de novo* on its merits.

It seems to us that the question in issue was not decided in the case instituted under Act X. of 1859 which came up in appeal to this Court in 1870 (reported in 14

Weekly Reporter, page 447). What the Court decided then was that, as, upon the face of the plaint, certain sums of money were claimed as *bhika*, and not as rent, the Revenue Court had no jurisdiction to entertain the suit as regards those sums. The Court did not decide whether the *bhika* claimed was in fact an illegal cess, and therefore could not be recovered, or whether the money said to have been received by the tehsildar under the head of *bhika* was in fact received by him. It went no further than to say that, inasmuch as it was claimed *not as rent*, the point could not be dealt with in a suit brought under section 24 of Act X. of 1859.

The first suit, having been dismissed for want of jurisdiction, is no bar to the present suit.

The question then arises whether the plaintiff can prove such facts as will entitle him to a decree. The lower Courts must not take it for granted that there was any such illegality in the receipt of the moneys claimed (if, in fact, they were received by the tehsildar) as necessarily prevents the plaintiff from succeeding now. If the tenants really did make any payments to the tehsildar in excess of the rents due from them, and those payments were made voluntarily, then the tehsildar, having received them for the plaintiff, was clearly bound to account for them. No doubt, if these sums were received by the tehsildar as *bhika*, and were "exacted" (within the meaning of section 10 of Act X. of 1859) by the tehsildar, they would come under the head of illegal cesses; and in that case the present action would not lie to recover them. But everything depends upon the circumstances under which the payments were made.

It is for the plaintiff to prove that the sums which he says were received by the tehsildar were in fact received, and also to prove that the payments were made voluntarily, and were not exacted in excess of the specified rent so as to be recoverable under section 10, Act X. of 1859, from the person who received them. There must be an inquiry as to the circumstances under which the several sums were paid, and whether they were voluntarily paid. If any sums were voluntarily paid to the tehsildar, the plaintiff will get a decree for them; but if they were "exacted," then the plaintiff's suit as to them must fail.

The case is remanded to the first Court for re-trial. Costs will abide the result.

The 2nd December 1875.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Mahomedan Law—Pre-emption.

Case No. 2970 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 23rd September 1874, affirming a decision of the Additional Moonsiff of that District, dated the 11th September 1873.

Shaikh Elahee Buksh (Plaintiff), *Appellant,*

versus

Mussamut Bibee Mohan and another (Defendants), *Respondents.*

Moonshee Abdool Baree for Appellant.

Mr. J. Younan for Respondents.

A claim of pre-emption by vicinage (tulub-i-mowasibut) was rejected, because the claimant, though aware of the sale of the property three or four days after execution of the deed of sale, did not make his claim until the lapse of a month and two days after the deed was registered.

THE plaintiff is the special appellant in this case. He claimed a right of pre-emption by vicinage in a house which was sold by Ali Jan Shaha to Elahee Buksh. Both Courts have found that the plaintiff, although he has made out that he is, in right of vicinage, entitled to claim pre-emption, has not proved that he performed the necessary ceremonies required by the Mahomedan Law. It has always been held by our Courts that the performance of these ceremonies must be strictly proved. Both Courts have found on the evidence, and particularly on the evidence of a party who was cited by both parties, namely, Hajee Abdoolla, who was a near neighbour of the plaintiff, and also a neighbour of the vendor, that the plaintiff was aware of the sale to Elahee Buksh within three or four days after the execution of the deed. Moreover, it may also be said that the deed was publicly registered on the 4th of February, and the plaintiff does not profess to have made his claim of tulub-i-mowasibut until the 6th of March.

On the whole case, I concur with the Courts below, and dismiss the special appeal with costs.

The 3rd December 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Rates of Rent—Pottah—Decree.

Case No. 102 of 1874.

Special Appeal from a decision passed by the Officiating Additional Judge of the 24-Pergunnahs, dated the 2nd October 1874, modifying a decision of the Moonsiff of Sealdah, dated the 18th May 1874.

Mon Mohinee Debee (Plaintiff), *Appellant,*

versus

Binode Beharee Shaha (Defendant), *Respondent.*

Baboo Bhyrub Chunder Banerjee for Appellant.

Baboo Roop Nath Banerjee for Respondent.

A rate of rent decreed to a landlord for a certain year is binding on the tenant as regards ensuing years until the latter obtains a decree to a different effect.

Jackson, J.—THE Additional Judge, in delivering judgment in this case, has censured by implication the Moonsiff without, as appears to us, any sufficient reason. He says: "It is quite obvious that in this case the lower Court never read the plaint," and the Judge himself has read the plaint in the sense of conceiving that the words at the conclusion of it mean that the decision of the present suit was to abide the decision of the pottah-suit. He says that, unless this were the meaning, the request of the plaintiff would be senseless. It appears to us on the other hand that the Judge has misread the plaint. All that the plaintiff says in his plaint is this: "By reason of the other suit "pending in the Judge's Court, I am unable "to file immediately in this case my principal "documents. I therefore pray that this case "be allowed to stand over until the ot "suit is decided one way or the othe Now the parties stand in this position: T plaintiff had obtained a judgment which affirmed in special appeal by this Court as the rent of 1276, and under which defendant had to pay at the rate of Rs. a beegha. The defendant afterwards brou a suit to obtain a pottah, and got a decree a pottah for one year at the rate of Rs. That decree was made in the course of year 1873, and was, therefore, in the abse of anything to the contrary, to take eff from the next Bengalee year, that is to the year beginning in Bysack 1281. Acco ing to the usual course in these matters, previous rate for which the plaintiff had a decree in 1276 would be binding would be the proper rate for the defend to pay annually until he had obtained decree to a different effect, *viz.*, that the must be reduced. The present suit was the rent of 1277, *viz.*, the year immedia following that for which the decree obtained. It appears to us, therefore, the plaintiff was entitled in the present to a decree at the rate of Rs. 25 a beeg and that the judgment of the Lower App late Court, which, in that respect, modified judgment of the Moonsiff, must be set asi and the Moonsiff's judgment restored costs.

The 3rd December 1875.

Present:

The Hon'ble Louis S. Jackson and W. McDonell, *Judges.*

Mortgage—Mortgagee's Possession.

Case No. 122 of 1875.

Special Appeal from a decision passed the Subordinate Judge of Hoog dated the 28th September 1874, affirm a decision of the Second Moonsiff Serampore, dated the 17th June 1874.

Sreemunt Dutt and another (Defendants) *Appellants,*

versus

Krishna Nath Roy and another (Plaintiff *Respondents.*

Baboo Gopal Lall Mitter for Appellants

Mr. R. T. Allan and *Baboo Mohinee hun Roy* for Respondents.

Where money was lent on mortgage without a stipu lated rate of interest, and it was mutually agreed th

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mortgagee was to retain possession for a given d precisely calculated, the stipulation was held to e a condition that the property was not to be n out of the hands of the mortgagee before the ation of that time.

Jackson, J.—It appears to us that the ntiffs in this suit were not entitled to over on the convenient principle stated by Moonsiff, *viz.*, that they were to borrow n they wanted money, and pay off and charge the creditor when they had got ney in pocket without any regard for the rests of the creditor. In this case there s no stipulated rate of interest, but it was nally agreed between the parties that, in sideration of the loan, the mortgagee was retain possession of the property pledged a period precisely calculated at eleven years d two months. It is obvious that, unless pulation be held to involve a condition t the property was not to be taken out of hands of the mortgagee before the ex- ation of that time, the mortgagee would be to the serious risk of having a property his hand for two or three bad years, and n taken out of his hand without any pos- bility of making good the loss which he ay suffer in the absence of any stipulation r interest. The mortgagors, no doubt, ired to have a long term within which ey might make provision for money to pay the loan, but the mortgagee might, on e other hand, desire to secure for himself term which would guarantee to him a fair verage profit, even running the risk of having o or three bad years. Under these cir- mstances it seems equitable that the mort- gee is entitled to retain possession of the nd, and that the judgments cited in Weekly Reporter, Volumes XI. and XII., do in fact pply. We think therefore that the judg- ents of the Courts below must be set aside, nd the plaintiff's suit dismissed with costs.

We should add that the sentence in the dgment of the Subordinate Judge appears o indicate remarkable blindness to what is quitable when he says: "If, from providen- "tial reasons, the defendants did not get any "profits from the disputed land the few "years they held possession of the same, "this is not a good ground for the defendants "retaining possession of the disputed pro- "perties even after the payment of the prin- "cipal; and for this reason it cannot be held "that the plaintiffs are not competent to redeem "the property on payment of the amount "taken by them as loan." That is precisely the circumstance which we think entitles the defendant to retain possession.

The 6th December 1875.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Act VIII. of 1859, s. 216—Arbitration—Award—Umpires—Appellate Court—Pleas.

Case No. 446 of 1875.

Special Appeal from a decision passed by the Judge of Sarun, dated the 17th December 1874, reversing a decision of the Moonsiff of Pursa, dated the 31st December 1873.

Mahabeer Misser and others (Plaintiffs), *Appellants,*

versus

Juggur Nath Misser and others (Defendants), *Respondents.*

Baboo Doorga Dass Dutt for Appellants.

Baboo Roop Nath Banerjee for Respondents.

The appointment of an umpire under Act VIII. of 1859, s. 216, is required, where there are two or more arbitrators, to provide for any difference of opinion amongst them; but not where, with the consent of the Court, only one arbitrator has been appointed.

In a case of the latter description, where an umpire has been associated with the arbitrator without the authority of the Court and the consent of the parties, the arbitration-award may be rightly set aside.

An Appellate Court is not at liberty to find for the defendant on a title which the latter never set up in the first Court.

The plaintiffs are the special appellants in this case. The suit was for recovery of possession of a jack tree and a fig tree, alleged to be growing on the plaintiff's ancestral birt land situated in Mouza Munjhunpore Bhadolea, Pergunnah Goa, by adjudication of right. The suit is valued at Rs. 15, the price of the trees; and also to recover 9 rupees 6 annas, the price of the jack fruit appropriated by the defendants. The plaintiff alleges that the trees in question were planted by Bhyro Misser, the plaintiff's grandfather, on the ancestral birt land; that the plaintiff's predecessors and the plaintiffs themselves have all along appropriated the fruit of these trees without any interference on the part of any one else; that the defendants ousted them, the plaintiffs, of the above trees on the 1st of Sawun 1279 F. S., by forcibly appropriating the fruit thereof. The defendant No. 1's

answer was to this effect: He admits that the trees stand upon the plaintiff's birt land, but he alleges that they were planted by his (the defendant's) father, Benee Misser, and that, in the exercise of his ryotee right, he, the defendant, is entitled to half of the fruit of the two trees; and the plaintiff, in the exercise of the hakimee right, is entitled to the other half. Both parties agreed to refer the matter to arbitration, and both consented to the appointment of one Ram Narain Singh as arbitrator. The Moonsiff says that the papers were made over to the arbitrator who was directed to appoint an umpire. How an umpire was necessary when only one arbitrator was appointed is not easy to understand; under section 216 of the Code, an umpire is appointed, if there be two or more arbitrators, so as to provide for any difference of opinion amongst the arbitrators. But only one arbitrator having been appointed by the Court with the consent of the parties, the appointment of an umpire was wholly unnecessary. This arbitrator, Ram Nárain Singh, called in three other parties without the authority of the Court and without the consent of the parties to the suit. This is admitted, and the Moonsiff, therefore, very properly rejected the arbitration-award altogether, and proceeded to try the suit upon the evidence adduced by both parties. On the first issue, namely, whether the trees in question were planted by the plaintiff's grandfather and predecessor, and whether the fruits thereof were forcibly appropriated by the defendant, or whether, as the defendant alleged, the trees were planted by his father, and he is entitled to the ryotee right which would be one-half of the fruit, the Moonsiff, after laying the onus on the defendant, finds that the trees were planted by the plaintiff's ancestor, and that the defendant had no right whatever to the fruit. He therefore decreed the plaintiff's suit in modification of what he claimed, and awarded 1 rupee 4 annas as the price of the jack fruit appropriated by the defendant. On appeal by the defendant, the Judge of Sarun has reversed this decision. He holds that Ram Narain Singh having called in other parties and associated them in the award "rather strengthened his opinion than weakened it;" that it was out of the question to suppose that, without a shadow of title, the defendant would or could have dispossessed the plaintiff forcibly. He therefore accepts the arbitration-decisionsupported, as it is in the opinion of the Judge, "by the probabilities of the affair." He also believes the defendant's witnesses who go to prov that the defendant is entitled as purchase to one-half of the fruit, and he disagrees wit the Moonsiff in rejecting the zur-i-peshge deed filed by the defendant.

Now it is clear that this decision of th Judge is wrong. The arbitration-award wa properly set aside by the Moonsiff, as th arbitrator had no authority to associate an other parties with himself in the arbitratio without the authority of the Court and th consent of the parties to the suit. The the Judge has found for the defendant upo whom the onus admittedly is, as he admit that the trees are growing on the plaintiff' land, on a title which the defendant himsel never set up in the Court below. Th defendant's case was that his father plante the trees on the plaintiff's land, and that therefore, as a ryot, he is entitled to one-half o the fruit. The Judge found for him o quite a different plea which was never s up, namely, that he has proved his case a purchaser of one-half of the fruit of th trees. The Judge's decision, therefore, i reversed, that of the Moonsiff restored, an this appeal decreed with all costs payable b the respondent.

The 6th December 1875.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Appellate Court—Questions of Fact.

Cases Nos. 449 and 450 of 1875.

Special Appeals from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 2nd October 1874, affirming a decision of the Officiating Moonsiff of that District, dated the 6th August 1874.

Syud Shah Ekbal Hossein (Plaintiff), *Appellant,*

versus

Bunsee Sahoo and others (Defendants), *Respondents.*

Moulvie Syud Murhumut Hossein for Appellant.

Moonshee Mahomed Yusuf for Respondents.

In a suit to establish a right of pre-emption, a plaintiff is bound to prove the performance of the preliminary ceremonies.

It is not necessary for an Appellate Court in every case to give its reasons in detail for agreeing with the lower Court on a pure question of fact, and where a case turns entirely on the weight of the evidence.

It is admitted that one judgment will govern both these cases. The plaintiff is the special appellant in both cases. He sued on a right of pre-emption. The second issue raised in the first Court was whether or not the plaintiff had performed the preliminaries or conditions of pre-emption. Now it has been held in many cases that it is the bounden duty of the plaintiff strictly to prove the performance of these ceremonies, *viz.*, *tulub-i-mowasibut* and *tulub-i-ishtehshad*, before he is entitled to claim a right of pre-emption. The Moonsiff held on the whole evidence in these words: "The Court is of opinion that "the performance of preliminaries such as "*tulub-i-mowasibut* and *tulub-i-ishtehshad* "has not been proved by the evidence of the "witnesses." On appeal, the Additional Judge of Tirhoot, in his decision which has been put up in the paper-book of Special Appeal No. 450, says: "There is no reason to in-"terfere with the Moonsiff's decision. The "witnesses were examined by him, and he "utterly distrusted their evidence on the "falsity of which he commented strongly. "Indeed, very little was urged on appeal "beyond the assumption that he should have "credited the evidence of the witnesses cited. "The Moonsiff's orders are confirmed, and "the appeal is dismissed with costs."

In special appeal it is contended that the Judge should have given independent reasons of his own for agreeing with the Moonsiff. I do not think it was at all necessary for him to do so in a case of this description; the question was one of fact, the onus was heavily on the plaintiff to prove by the most convincing evidence that he had performed the necessary preliminaries under the Mahomedan Law, and the first Court gave very good reasons in my opinion for disbelieving the evidence adduced by the plaintiff in support of his allegation. It is not necessary for a Judge in every case to give his reasons in detail for agreeing with the lower Court on a pure question of fact and where a case turns entirely on the weight of the evidence. The special appeals are, therefore, dismissed with costs.

The 8th December 1875.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Remands—Limitation—Presumptions.

Case No. 3095 of 1874.

Special Appeal from a decision passed by the Second Subordinate Judge of Mymensingh, dated the 7th September 1874 reversing a decision of the Additional Moonsiff of Netrokonah, dated the 5th April 1873.

Chunder Kishore Chuckerbutty and another (two of the Defendants), *Appellants,*

versus

Gour Chunder Chuckerbutty and another (Plaintiffs), *Respondents.*

Baboo Motee Lall Mookerjee for Appellants.

Baboo Protap Chunder Mojoomdar for Respondents.

Where the first issue raised before the Moonsiff was limitation, and the suit has been disposed of upon that issue, the Lower Appellate Court ought not to remand the case, but itself to decide the question of limitation upon the evidence on the record.

Where limitation is pleaded, the question of the plaintiff's possession within twelve years before the commencement of the suit is simply a matter of fact to be proved like anything else, and not to be decided upon any supposed presumption.

Macpherson, J.—We reverse the order of the Subordinate Judge, and direct him to decide whether or not, upon the evidence, it was proved that the plaintiffs, or those through whom they claim, ever had possession of the land in dispute within twelve years before this suit was commenced. If they had not, the suit is barred by limitation, and must be dismissed. That was the first issue raised and tried by the Moonsiff, and upon that issue he disposed of the suit. It is not a case which the Subordinate Judge ought to have remanded. He ought himself to have disposed of the question as to limitation, upon the evidence on the record. If he had considered the evidence, and had decided that the suit was not barred by limitation, reversing the decision of the Moonsiff upon that point, then, no doubt, the case would have had to go back to be tried on the merits. But there is no possible reason why the case should be tried on the merits till,

in the first instance, it is distinctly ascertained whether or not the suit is barred by limitation.

The case must be dealt with on the evidence properly before the Court. As to there being any presumption that Bhoobunessuree had or had not possession, all we can say is, that it is not a question of presumption in any degree. Whether she had possession or not is simply a matter of fact which must be proved like anything else, and is not to be decided upon any supposed presumption either for or against it. The appellant will get his costs of this appeal.

The case will be taken up at once out of its turn, and be disposed of with the least possible delay.

The 8th December 1875.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Rent-suit—Special Appeal—Act VIII. (B. C.) of 1869, s. 102.

Case No. 693 of 1875.

Special Appeal from a decision passed by the Judge of Sarun, dated the 6th January 1875, reversing a decision of the Moonsiff of Pursah, dated the 11th May 1874.

Moulvie Syud Mahomed Tuque, Manager under the Court of Wards on behalf of Lalla Nursingh Narain, lunatic (Plaintiff), *Appellant,*

versus

Fouzdar Roy (Defendant), *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboo Doorga Dass Dutt for Respondent.

Where a suit for rent of certain years, not exceeding Rs. 100, based upon a kubooleut and jummabundee, was dismissed in appeal, on the ground that those documents were forged, and the Lower Appellate Court, in order to arrive at a decision as to the amount of rent due, inquired into and decided upon the genuineness of the mokurruree pottah set up by the defendant, HELD that Act VIII. (B. C.) of 1869, s. 102, precluded any special appeal in the case.

THE plaintiff is the special appellant in this case. The suit was brought on behalf of a lunatic's estate, which is under the Court of Wards. The suit is for rent of the years 1278 to 1280 Fuslee under a kubooleut and jummabundee alleged to have been executed by the defendant. The defendant denied the execution of the kubooleut and jummabundee, and broadly stated that they were forgeries. His allegation was that he held under a mokurruree pottah, dated the 25th of Jeyt of 1218 F., for ten beeghas of land at a yearly rent of Rs. 5, that he had paid the whole of the rent due to the gomashta with the exception of one rupee which had been lodged in Court.

The Moonsiff found for the plaintiff, holding that the plaintiff had proved the kubooleut and jummabundee on which his suit was based, and that the defendant's mokurruree pottah was from the appearance of it not a genuine one, and that he had not proved the receipts filed by him, or the payment of the rent alleged to have been paid by him. He therefore decreed the plaintiff's claim, including the one rupee deposited by the defendant in Court. On appeal, the Judge reversed that decision. He says (I am quoting the words of the Judge): "The plaintiff has come into "Court on a false case with the clear intention, as defendant says, and as I believe, of "destroying the defendant's mokurruree "and increasing his rent, and he has supported his claim by false evidence and "false documents. I therefore reject it "utterly." The decision of the first Court therefore was reversed by the Judge, and the plaintiff held entitled not even to the one rupee which the defendant had lodged in Court; the Judge having found that the plaintiff who had based his suit upon the kubooleut and jummabundee had not proved his claim, and that the documents on which that claim was based were forgeries.

The pleader for the special respondent has taken a preliminary objection that this appeal will not lie under the provisions of section 102 of Act VIII. of 1869, inasmuch as the amount sued for does not exceed Rs. 100, and that no question of right to enhance or vary the rent or relating to any title to land or to some interest in land as between parties having conflicting claims thereto has been determined by the judgment. In support of his argument, the

pleader for the respondent says that the genuineness of the mokurruree pottah alone was gone into by the Judge in order to enable him to arrive at a conclusion as to what the amount of rent was, and that the validity of that mokurruree pottah was not in any way gone into, that therefore there has been no determination of any question of title in land as between parties having conflicting claims thereto. He quotes in support of his argument two cases in Volume XX., Weekly Reporter, pages 15 and 16. On the other hand, it is contended by Baboo Unnoda Pershad Banerjee, who appears for the special appellant, that a question of title has been decided in this suit; and, inasmuch as the Civil Courts trying cases under Act VIII. of 1869 have jurisdiction to try questions as to the amount of rent due and questions of title, the decision of the Judge holding that the mokurruree pottah of the defendant is a genuine one will be a bar to any suit which the plaintiff may be advised to bring for the purpose of testing the validity of that mokurruree, or for the enhancement of the rent of the defendant's holding.

I am of opinion that section 102, Act VIII. of 1869, precludes any special appeal in this case. The suit, as already observed, is a simple suit for rent of certain years based upon a kubooleut and jummabundee. The defendant, the ryot, stated that these documents were forged, and that he held under the plaintiff, not under these documents, but under the mokurruree; the amount of rent was also disputed, and it became necessary for the purpose of deciding the amount of rent due to inquire into the genuineness of the defendant's mokurruree pottah. The Judge has found that deed to be genuine, but he has also found that the plaintiff's suit, which is based upon a kubooleut and jummabundee, was a false suit, and that these documents are forged. The Judge might well have stayed his hand here, and gone no further into the case, the onus being clearly on the plaintiff; and any opinion which he has expressed on the genuineness of the mokurruree pottah was merely to enable him to arrive at a decision as to what the amount of rent was. Therefore it appears to me that the cases referred to in Volume XX., Weekly Reporter, pages 15 and 16, apply to this case. The special appeal is dismissed under section 102, Act VIII. of 1869, with costs payable by the appellant.

The 8th December 1875.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Prescription—User—Act IX. of 1871, s. 27—Admissions—Findings.

Case No. 539 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 26th January 1875, affirming a decision of the Sudder Moonsiff of that District, dated the 22nd April 1874.

Shaikh Hubeebul Hossein (Defendant), *Appellant,*

versus

Shaikh Shahamut Ali (Plaintiff), *Respondent.*

Case No. 545 of 1875.

Shaikh Hubeebul Hossein (Plaintiff), *Appellant,*

versus

Shaikh Shahamut Ali (Defendant), *Respondent.*

Messrs. R. E. Twidale, M. L. Sandel and *C. Gregory*, and *Moonshee Mahomed Yusuf* for Appellant.

Baboo Rajendro Nath Bose for Respondent.

A suit to establish a right of prescription to an easement cannot be maintained if enjoyment has extended to fifteen years only.

A suit for the removal of an obstruction, the existence of which was admitted by the defendant, was HELD to have been wrongly dismissed by the lower Courts on an adverse finding of fact, *i. e.*, that the obstruction did not exist.

THESE two appeals have been heard together. Hubeebul Hossein is the special appellant in both cases. He is the plaintiff in one case in the Court below, and defendant in the other. I take Special Appeal No. 539 first. In that case Shahamut Ali is the plaintiff, and Hubeebul Hossein, the special appellant before me, is the defendant. The suit of Shahamut Ali was to establish his right of prescription by continuous user of an easement in the shape of a drain. He commences his plaint by saying that he sues to clean or clear up ("safkurna nullah

kudeem") an old ancient drain. Then he goes on to say by establishing his right by prescription ("hukyut ijrae âb)." Then he says further in his plaint that he has enjoyed this right "kudeemul ayam zaedeh doazdah sal." Then, with reference to the action of the defendant in the case, he says: "Khelaf mamoolé kudeem kohee afhâl nowhedass karneka moddabhe ko huq nahin hai," that is to say, the word "nowhedass" refers to certain verandahs, koorsees, and other buildings newly erected by the defendant contrary to the ancient prescriptive rights. Therefore it appears to me abundantly clear that this suit of the plaintiff is based upon continuous user, and that he seeks to establish his right by prescription to this easement. It is admitted that the suit was instituted after Act IX. of 1871 came into operation. In a suit for any way or water-course or any other easement which is brought after this Act comes into operation, it must be proved (see section 27) that the party claiming the right has peaceably and openly enjoyed that right without interruption, and for twenty years. And the said period of twenty years is to be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested. The illustrations annexed to the section show clearly the intention of the Legislature. In Illustration A, a suit is brought in 1871 for obstructing a right of way; the defendant admits the obstruction, but denies the right of way. If the plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an easement and as of right without interruption from the 1st of January 1850 to the 1st January 1870, the plaintiff is entitled to judgment. Why is he entitled to judgment? Because from 1850 to 1870 twenty years had elapsed, and the suit being brought in 1871, he brings his suit within the two years that are prescribed, that is to say, the twenty years did not end more than two years next before the institution of the suit. Then, in Illustration B, a suit is brought also in 1871, the plaintiff proves that he enjoyed the right in the manner aforesaid from 1848 to 1868; the suit shall be dismissed. From 1848 to 1868 is twenty years, but why is the suit dismissed? Because he brings it in 1871 which is more than two years after the expiration of the twenty years.

Now, in this suit the plaintiff brings it as already stated after the Act came into operation. He had first to show twenty years' enjoyment without interruption. Then aft proving that he had to show that the twent years ended within two years next to th institution of the suit. Now, in the fir place, his own witnesses state, and th pleader who appears for him admits tha their evidence, taking it at its very best an admitting it to be reliable, proves the enjoy ment of the plaintiff for a period of fiftee years only. I am therefore clearly of opinio that the suit is barred; and, in support o my decision, I would refer to a ruling i Volume XX., Weekly Reporter, page 228, b Justices Phear and Morris. The specia appeal No. 539 is, therefore, decreed wit costs payable by the respondent.

In special appeal No. 545, Hubeebu Hossein was the plaintiff in the Court belo and Shahamut Ali was the defendant. Th suit of Hubeebul Hossein, the special appel lant before me, was to remove a drain whic had been recently constructed by the defend ant Shahamut Ali twenty hâths long nort to south and 1½ hâths broad east and wes Hubeebul Hossein's case was that the drai of Shahamut Ali's house after running sout to north passed westward, but to the nort of the plaintiff Hubeebul Hossein's cow house. The Moonsiff has found on th question of fact that the drain runs fro south to north, but does not take the turn t the west; and he gives his reasons why i does not, namely, that the lands to the wes are higher, and therefore that the drainag could not escape over those lands.

Both Courts have dismissed the plaintiff' suit with reference to the removal of th obstruction alluded to above, namely, th obstruction erected on the *gow-shala* of th plaintiff.

In special appeal it is contended tha Shahamut Ali having admitted on the spo before the Moonsiff, and as shown by th map, that the drain in dispute has been take through the *gow-shala* of the plaintiff b Shahamut Ali since a year prior to th making of that map, the Moonsiff and th Subordinate Judge were clearly wrong i dismissing the plaintiff's suit with reference to that portion of the case, namely, the newly-erected drain, the removal of which the plaintiff sues for.

I find, on referring to the map and to the decision of the Moonsiff, that this is the case. Therefore the special appeal No. 545 of Hubeebul Hossein must also be decreed, and the decisions of the Moonsiff and of the Subordinate Judge dismissing his claim must be reversed with costs.

The 9th December 1875.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Procedure on Death of Defendant—Written Statements from Third Parties—Introduction of Fresh Defendants.

Case No. 318 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 23rd September 1874.

Moharanee Surno Moyee (Plaintiff), *Appellant,*

versus

Bykunt Chunder Mustofee and others (Defendants), *Respondents.*

Baboos Sreenath Doss, Bhugobutty Churn Ghose, and *Mohinee Mohun Roy* for Appellant.

Baboos Ashootosh Dhur and *Kalee Mohun Doss* for Respondents.

As soon as it is proved that a defendant was dead at the time the plaint was filed, the Court ought to refuse to proceed further in the suit, and to leave it to the plaintiff to begin *de novo* against the person against whom alone he can legally move.

A Court has no authority to receive a written statement in a suit from one who is not a party, or to permit such a person to appear at the hearing.

A Court is not competent to allow of the introduction into a suit of a party against whom no relief is sought by the plaintiff.

Macpherson, J.—The procedure of the lower Court in this case has been exceedingly lax; and the trial has been so insufficient that it is impossible for us now to deal finally with the suit.

The suit is brought by the plaintiff against Gouree Pershad Doss to recover Rs. 10,512-9-2 due as arrears of rent "from Kist Bysack 1279 to Kist Aughran 1280" on account of "a temporary jote tenable at will" recorded in the plaintiff's serishta in the name of the said Gouree Pershad Doss, &c.

The plaint was filed on the 2nd of April 1874. On the 15th of May, one Umbika Pershad filed a written statement, stating that Gouree Pershad was his father, and had died on the 19th of February 1874; that he, Umbika, was his sole heir; that Gouree Pershad was not liable for the arrears claimed, because the jote belonged to one Bykunt Chunder Mustofee, although it stood benamee in the name of Gouree Pershad; that the suit was needlessly brought against Gouree Pershad; and that Umbika would "urge other objections verbally at the time of trial," and would claim costs, &c.

The first irregularity to be noticed is that though, on the 15th of May, this written statement was filed, alleging that Gouree Pershad was dead when the suit was instituted, the suit was nevertheless allowed to go on as a suit against Gouree Pershad until the 23rd of September 1874, on which day, the trial of the cause being concluded, judgment was delivered. In the proceedings subsequent to the judgment, Umbika's name appears as a defendant; but how or when it got there does not very distinctly appear. No great practical injustice was done to Umbika in treating him as a defendant, though he, in truth, was not a defendant. For in his written statement he had substantially assumed the position and rights of a defendant. Still it was most irregular to permit the suit to go on nominally against a dead man; and it was the clear duty of the Court to have declined to proceed until it was proved that Gouree Pershad was alive and had been duly served with the summons in the suit, or until the son-and-heir was (on his own suggestion, for it could not have been done save with his consent without amending the plaint) substituted on the record for his deceased father. Strictly speaking, as soon as it was proved that Gouree Pershad was dead at the time the plaint was filed, the Court ought to have refused to proceed further in that suit, and should have left it to the plaintiff to begin *de novo* against the person against whom alone he could legally move.

On the same day that Umbika filed his written statement, a statement was also filed by Bykunt Chunder Mustofee, corroborating Umbika's statement, alleging that the jote belonged to him (Bykunt Chunder), and setting up various other pleas. From that time forth, this Bykunt Chunder, who is the only respondent who now appears before us, was treated by the lower Court as a defendant in the cause, although not formally added as a party. One of the issues fixed for trial was whether the suit could proceed without making Bykunt Chunder a defendant. And, on the 23rd of September, when judgment was finally delivered, the Court ordered that he should be made a party defendant, at the same time giving a decree against him for a portion of the amount claimed, making

no decree as to Umbika, nor, in any way, expressly disposing of the suit as against him.

We are at a loss to know what authority the lower Court had for receiving a written statement on the 5th of May from one who was not a party to the suit, or for permitting one who was not a party to appear at the hearing, and contest the plaintiff's demand. The question of adding Bykunt Chunder as a defendant ought to have been the subject of a separate and preliminary application; and until formally placed on the record as a defendant, no written statement should have been received from him, and he should not have been allowed to appear at the hearing.

The Subordinate Judge has manifestly paid no attention whatever to some of the simplest and most ordinary rules of procedure.

But, apart from any question of irregularity, the Subordinate Judge was wholly wrong in allowing Bykunt Chunder to be introduced into the suit as a defendant at all. The plaintiff sought no relief as against him. She asserted that her claim was against Gouree Pershad Doss alone, and wished to stand or fall on the latter claim only. Under such circumstances Bykunt Chunder ought not to have been made a defendant, and the plaintiff ought not to have been forced into a contest with him from whom she claimed nothing.

It would have been far simpler and more conducive to the ends of justice to have dealt with the plaintiff's suit as she wished it to be dealt with, *i. e.*, to have decided the naked issue raised between her and Gouree Pershad, and to have left any further issues between the plaintiff and Bykunt Chunder to be settled hereafter when raised in a regular and formal manner.

Bykunt Chunder and Umbika having, however, found their way on to the record as defendants, it seems best that we should leave them there, and treat them as if properly before the Court. To do otherwise at this stage of the proceedings would put all parties to much expense, and cause great delay.

The tenure for the rent of which this suit has been brought was purchased in the name of Gouree Pershad so long ago as the 30th of January 1848, and has stood in his name in the zemindar's serishta from that time to this. It is clear also that the rents have been paid by Gouree Pershad, and were received by the zemindar as paid by Gouree Pershad, so far as formal receipts and the like are concerned. But it is alleged on behalf of Bykunt Chunder that Gouree Pershad never had any beneficial interest in the tenure; that he was merely benamee for Bykunt Chunder; that the zemindar was all along aware of this and received the rents from Bykunt Chunder, and dealt with him as the real owner of the tenure; that, on the 27th of May 1872, Gouree Pershad executed a "Muktipatro" or deed of disclaimer of all interest in the tenure, of which deed the plaintiff had notice; and that, under all the circumstances, Gouree Pershad never was liable for the rents sued for, and they are recoverable from Bykunt Chunder alone, if from anybody. It appears further that Bykunt Chunder denies that the tenure is a mere temporary jote, and alleges that it is a mokurruree or permanent tenure. And it is contended, in argument before us, that, if the tenure be merely a temporary jote as stated in the plaint, registration in the zemindar's serishta was not necessary; and, therefore, that, although Bykunt Chunder's name has not been registered, and whether or not he has been recognized by the zemindar as the holder of the tenure, the plaintiff's suit cannot succeed if Bykunt Chunder was in fact the tenant in possession.

We cannot agree with the Subordinate Judge in thinking it proved that the plaintiff ever received rent from Bykunt Chunder, or acknowledged him to be his tenant. The two letters specially put forward as showing this seem to us by no means sufficient for the purpose; and we are not inclined to place much reliance on the evidence of Lukee Kant Sircar. The case of the defendants is that, although Bykunt Chunder was the real tenant, the tenure stood in the name of Gouree Pershad, in whose name the business connected with the property was ordinarily conducted. If persons choose for their own private purposes to hold property for many years benamee, instead of honestly avowing it to be their own, the onus is entirely on them to show that those who have dealt with the estate knew and recognized the true state of affairs. Such knowledge and recognition must be clearly proved, and are not to be presumed, even although it may be proved that the property was in fact held benamee as alleged.

There having been no acceptance of rent from Bykunt Chunder, and no recognition of him by the zemindar as his tenant, it becomes necessary to ascertain accurately the nature of this tenure which Gouree Pershad purchased in 1848. If, as alleged in the plaint, it is not a mokurruree or permanent jote,

the question arises whether registration in the zemindar's serishta was necessary, and whether Gouree Pershad's liability did not cease, if, and when, he gave up possession to Bykunt Chunder, and gave notice thereof to the zemindar—if he did in fact ever put Bykunt Chunder in possession, or give the zemindar notice of his having done so.

We set aside the decree of the Subordinate Judge, and remand the case that the remaining issues may be carefully tried and accurately and clearly determined. These issues are:—

(1.) What is the precise nature of the tenure purchased by Gouree Pershad and standing in his name in the zemindar's books? Is it a temporary jote or tenancy-at-will as stated in the plaint, or is it a mokurruree or permanent tenure as suggested by Bykunt Chunder; and what in particular is it?

(2.) If the tenure is not a mokurruree or permanent tenure, did Gouree Pershad at any time (and when) give notice to the zemindar that he had no interest in the tenure, and that it belonged to Bykunt Chunder, and that Bykunt Chunder alone was in possession?

(3.) Was Bykunt Chunder, in fact, in possession alone, and, if so, from what date and how was he put in possession, and by whom?

(4.) Is the rent sued for or any portion of it due from Umbika as the representative of his father Gouree Pershad?

(5.) Is the rent or any portion of it due from Bykunt Chunder?

The parties may be allowed to go further into evidence; and Bykunt Chunder must be heard on all the issues—as well with respect to the liability of the heir of Gouree Pershad as with respect to his own liability.

It has been urged before us that the word *babut*, which constantly appears in the receipts and other papers in evidence in this suit, is to be read in its ordinary sense of "on account of;" and in particular we are asked to translate the expression "*babut Kameshuri*" as meaning "on account of Kameshuri." But there is no doubt that *babut* is not used in that sense in these papers. It is invariably used in the sense of "previously held by," as it is translated in the Court translation of the plaint. It in fact is used always as an additional description of the tenure—the tenure "in the name of Gouree Pershad previously held by Kameshuri." Indeed, the tenure is frequently traced further back, thus: "Babut Kameshuri mudafut Joggo Mohun Chuckerbutty *daroon* Sumbhuram Chuckerbutty." It is clearly a mistake to translate the words "*babut Kameshuri*" in any of these papers "on account of Kameshuri." We call attention to this, because a good deal was made of the point in argument before us on behalf of Bykunt Chunder, and there really is nothing in it.

The case is sent back for further trial. The decree to be eventually passed by the Subordinate Judge will depend on the conclusions he arrives at on the issues which we now direct him to try.

The costs will abide the result.

The 9th December 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Partition—Recognition by Zemindar.

Case No. 1672 of 1874.

Special Appeal from a decision passed by the Officiating Additional Judge of the Twenty-four Pergunnahs, dated the 8th July 1874, modifying a decision of the Moonsiff of Alipore, dated the 28th February 1873.

Ooma Churn Banerjee (one of the Defendants), *Appellant,*

versus

Raj Luckhee Debia (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Bhowanee Churn Dutt* for Appellant.

Baboo Nil Madhub Bose for Respondent.

A zemindar may recognize the division of a holding, either formally by actually dividing it into parts, or impliedly by receiving rent from parties holding separately.

Jackson, J.—There is an error in the judgment of the Lower Appellate Court in so far as it modifies the decree of the Moonsiff by making all the defendants jointly liable. The Lower Appellate Court does so upon the ground that, although the defendants may have effected a separation of the holding between themselves, the plaintiff is in no way bound to recognize such separation. Now, it was part of the defendant's case that the plaintiff had recognized such separation by receiving rent separately from the tenants. There are various ways in which a zemindar may recognize the division of a holding. He may do so formally by dividing the holding into separate parts, or by implication by receiving rent from parties holding separately. It seems, however, that the defendant, now

special appellant in the case, went much further than this, for he alleges that here the holding was separate from the commencement. The Judge must inquire into this matter and find whether the defendants always held separately, or whether their separate holding has been acknowledged by the plaintiff by the course of dealing between them, that is, by receipt of rent from them separately so as to constitute a sufficient recognition.

The 9th December 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Attachment—Onus Probandi.

Case No. 175 of 1875.

Special Appeal from a decision passed by the Officiating Additional Judge of the Twenty-four Pergunnahs, dated the 18th January 1875, reversing a decision of the First Subordinate Judge of that District, dated the 31st August 1874.

Zahoorooddeen Ahmed (Plaintiff), *Appellant,*

versus

Kalee Doss Banerjee (Defendant), *Respondent.*

Mr. Trevelyan and *Baboo Rash Beharee Ghose* for Appellant.

Baboo Gooroo Doss Banerjee for Respondent.

Where an application is made to the Court to attach, as due and owing to the applicant from A, a sum of money which has been placed in the hands of B by C, it is incumbent on the applicant to prove that the money belongs, not to C, but to A.

Jackson, J.—It appears to us that the Judge has mistaken the side on which the burden of proof lay in this case, and that the mistake is one of great importance to the parties. We think that the Subordinate Judge rightly held that the plaintiff had discharged himself of whatever burden lay on him in the first instance by showing that he had placed the money in Nobo Poddar's hands; and the circumstance that a claim had been previously made, does not affect the question. It is not clear whether this is a case to which the provisions of section 81 of the Civil Procedure Code were properly applicable. This was not an attachment of the property belonging to, and in possession of, the defendant, but it was an applicati to the Court to attach, as being due a owing to the defendant, a sum of money the hands of a third person; and in circumstances it appears to us that the de sion of the Court on the claim put in that case did not alter the liability of t defendant to make out that which he n alleges. The money being placed in t hands of Nobo Poddar by the plaintiff, it clearly upon the defendant to prove that t money belonged, not to the plaintiff, but Belilios. On this point it was of the utmo importance to consider whether the eviden of Belilios, on whom the defendant relie was to be believed or not; and it was incum bent upon the Judge to decide that positivel The case must go back in order that t Lower Appellate Court may determine up the evidence whether the defendant h made out the plea which he set up, t burden being upon him.

The 9th December 1875.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Contract by Lessee—Suit against Parties i Possession—Onus Probandi.

Cases Nos. 422 to 425 of 1875.

Special Appeals from a decision passed the Judge of Sarun, dated the 9 December 1874, affirming a decision the Sudder Moonsiff of that Distri dated the 14th April 1874.

Baboo Huri Ram and another (Defendants *Appellants,*

versus

Bhikaree Roy and others (Plaintiff *Respondents.*

Baboo Judoo Nath Sahoy for Appellants.

Baboo Doorga Doss Dutt for Respondents.

A lessee has no right to make any contract detrime tal to his lessor's interests, which is to take effect aft the determination of the lease.

In a suit for possession and for establishment of tit against parties in possession under an award of the c minal authorities under Act X. of 1872, s. 530, the *onu probandi* is on the plaintiffs.

One decision admittedly governs these fou special appeals. The decision of the Judg

is to be found in appeal No. 424. It is necessary to state a few particulars as to the history of this case which, in my opinion, has been misunderstood by the Judge. The plaintiffs sued, alleging that they had a mowrosee kashtkaree tenure; that this tenure is situated in Mouzah Nautun; that the said mouzah was given in lease by the maliks thereof to the Bunwar factory in the first instance; that that lease expired in 1280 F. S.; that the first lessee, the proprietor of the indigo factory of Bunwar, sold his rights and interest in that factory to one Ram Dassee Kooer. This sale was made during the pendency of the lease, and it appears from the plaint that the former proprietor of the factory of Bunwar interfered with the possession of the plaintiffs, and that the plaintiffs brought a suit; that, during the pendency of that suit, the sale was made to Ram Dassee Kooer; that she was made a party to that suit; that subsequently a compromise was entered into between the plaintiffs and Ram Dassee Kooer, to the effect that she was to hold a portion of the plaintiffs' mowrosee kasht land for the purpose of cultivating indigo, paying rent to the plaintiffs; that if her lease, which expired 1280, was not renewed by the maliks, the lands so held by her were to revert to the plaintiffs and to be held by them as part and parcel of their mowrosee kasht jote; that, on the lease of Ram Dassee Kooer expiring, the maliks let out the mouzah of Nautun to the proprietor of the factory of Joyutpore, who are represented in this case by the defendants Nos. 1 and 2; that these defendants brought suits in the Fouzdaree Courts against some of the ryots, which were dismissed; that subsequently they brought other cases in the same Court against other ryots including the plaintiff; and that, on the 9th of January 1874, the criminal authorities placed the defendants in possession; that, under this order, the plaintiffs have been dispossessed, and their cause of action arose on the 9th of January 1874, the date of the order of the Magistrate under section 530 of the Code of Criminal Procedure. The plaintiffs, therefore, sue for possession of this land which they claim as part and parcel of their kasht mowrosee tenure. Both Courts have found for the plaintiffs.

In special appeal the points taken are, *first*, that the Lower Appellate Court is in error in supposing that the defendants claimed the lands in dispute as the successors of Ram Dassee Kooer, the former ticcadar, whereas the claim of the defendants is derived directly from the maliks of Mouzah Nautun; *second*, that the defendants had, in their written statement and in their grounds of appeal to the Lower Appellate Court, distinctly stated that the plaintiffs had no ancestral kasht lands in the mouzah, and that the Lower Appellate Court has erred in not trying this important question; *third*, that the special appellants, standing in the shoes of the maliks, are not bound by the solehnama to which they were no parties, and which was entered into by a former lessee, who had no right to make any contract detrimental to the malik's interests, and which was to take effect after the determination of her lease; *fourth*, that the special appellants, being admittedly in possession of the lands in dispute, the plaintiffs ought to have been required to prove their title to it. I think that all these grounds are good grounds, and that the Judge, as I have already observed, has misunderstood the case of the defendants. The Judge seems to be under the impression that the defendants professed to have acquired title to the land in suit as successors to Ram Dassee Kooer in the ticca of Nautun. The Judge uses these words in his decision: "They profess to have acquired "title to the land in suit as successors to Ram "Dassee in the ticca of Nautun, but, as her "ticca gave her no such title, they cannot, as "her successors, have acquired any such title "either." Now, it is manifest that the defendants never, in their written statement, set up any such plea as the Judge says they have done. They derive their title from the maliks of Nautun, and their lease commenced in 1281, when the lease to Ram Dassee Kooer admittedly expired. The defendants are in no way bound by any solehnama, which may have been entered into between Ram Dassee Kooer and the plaintiffs, and the terms of that solehnama could only be enforced during the term of Ram Dassee Kooer's lease, namely, up to 1280, and are of no force either as against the maliks or as against the defendants who derive title from the maliks after the expiry of Ram Dassee Kooer's lease. Then, on referring to the written statement of the defendants, portions of which have been read to me, it is clear that both Courts have erred in thinking that the defendants have admitted the mowrosee kashtkaree right of the plaintiffs; on the contrary, they consistently denied that any such rights existed on the part of the plaintiffs.

Then, it is very clear in this case that the defendants, being in possession of the disputed land under an award of the criminal authorities under section 530, the onus of proving title and possession is on the plaintiffs

in this case, and I can in no part of the Judge's decision find that he has come to any conclusion whatever as to whether the plaintiffs have proved, as they are bound to prove, their mowrosee kashtkaree right, their possession under that title, and their dispossession as alleged by them, under an order of the Fouzdaree Court, dated the 9th of January 1874.

The case must, therefore, go back to the Judge. He will throw the onus upon the plaintiffs, and he will try, first, whether they have proved, as they are bound to prove, their mowrosee kashtkaree right, and, if so, whether they have proved possession under this right up to the date of the Fouzdaree order under which the defendants were put into possession. The Judge will observe from the decision of this Court that the solehnama which is alluded to in the plaint is in no way binding upon the defendants.

All these cases are, therefore, remanded. Costs to follow the result.

The 10th December 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Criminal Action—Civil Damages—Costs—Special Appeal.

Case No. 311 of 1875.

Special Appeal from a decision passed by the Officiating Judge of the Twenty-four Pergunnahs, dated the 5th October 1874, affirming a decision of the Second Subordinate Judge of that District, dated the 16th June 1874.

Ooma Churn *alias* Gopal Chunder Roy Mozoomdar (Plaintiff), *Appellant,*

versus

Grish Chunder Banerjee (Defendant), *Respondent.*

Mr. L. M. Ghose for Appellant,

Baboos Unnoda Pershad Banerjee, Mohesh Chunder Chowdhry, and *Aubinash Chunder Banerjee* for Respondent.

A Civil Court is not bound, as a matter of law, to give damages for defamation after defendant has already been convicted and fined for the offence in the Criminal Court, where plaintiff has suffered no actual damage.

Where the first Court's discretion is improperly exercised in the matter of costs, the error may be rectified in regular appeal; but if this is not done by the Lower Appellate Court, the error is not such as would justify the High Court's interference in special appeal.

Jackson, J.—It appears to us that the plaintiff has been ill-advised in bringing this special appeal. We have not gone into the evidence, and, therefore, it is impossible for us to say what decision we might have come to if we had the evidence before us. Speaking for myself I may say that I should have been probably disinclined to order the plaintiff in this suit to pay the costs of the defendant, but that is a separate question. The Court below found, and both the Courts appear to concur in that conclusion, that, although the defamation and libel attributed to the defendant was not justified, yet the plaintiff had suffered no actual damages. The plaintiff had also complained in the Criminal Court and had brought about a conviction of the defendant, who had been fined for the offence of criminal defamation. Under the circumstances, we are not able to say, as a matter of law, that the Court of first instance was bound to give plaintiff damages, or that the Lower Appellate Court ought to have done so on appeal. It is contended that the plaintiff ought, at least, to have such damages as would have covered the costs, but it was pointed out during the argument that even if, as a matter of law, this Court could have directed a verdict of damages, it could not have declared what the amount of damages should be, and that, even then, it would have been at the discretion of the Court of first instance to give costs or not; and even if that discretion had been improperly exercised by that Court, the Lower Appellate Court might, in hearing the regular appeal, have rectified that error. This, in our opinion, is not such an error in law as would justify our interference in special appeal. But under the circumstances of the case, although we dismiss this special appeal, we do not think so well of the defendant's conduct as to hold him entitled to his costs here.

The 24th November 1875.

Present:

Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

essory and Declaratory Suit—Valuation—Rent-decree—Evidence.

Case No. 137 of 1874.

ular *Appeal from a decision passed by* e *Subordinate Judge of Jessore, dated* e *23rd March 1874.*

Hurro Nath Bhuttacharjee and others (Defendants), *Appellants,*

versus

Robert Harvey and others (Plaintiffs), *Respondents.*

oos *Chunder Madhub Ghose* and *Mohiny Mohun Roy* for Appellants.

Baboo Unnoda Persad Bannerjee for Respondents.

here a suit is for recovery of possession (with mesne-its) of a certain portion of land, and for a declaration ght in respect of the remainder, its valuation should include the value of the latter, which is only nomi- and requires a stamp of Rs. 10.

decree against the registered tenant, in a suit for against him and another, is not a binding evidence e possession of such tenant, as between him and other, in a subsequent civil action.

Jackson, J.—It is not necessary that we uld go at very great length into the facts d reasons of the decision in this case, ause in the main we concur in the judg- nt of the Court below. We think it ht, in the first place, to observe that this it has been, as regards the valuation, and erefore, as regards the venue of the appeal, properly framed. The plaint includes two atters, one of which is a prayer for posses- on of land belonging to the plaintiff which e defendants are said to have wrongfully t into their possession, and in respect of hich, of course, the plaintiff was entitled estimate his claim on the value of such and, together with mesne-profits which he as enabled by the law of limitation to sue or in respect of that land; but in respect of e remainder—that to which the second prayer relates, *viz.*, a prayer for declaration of right—the valuation was only a nominal one, and a stamp of Rs. 10 would have sufficed. The valuation of the plaint, there- fore, ought to have been reduced by deduct- ing the value of 5 khadas and so many andas of land now in the possession of the plaintiff, and also the mesne-profits in respect of such land, which deduction would have brought the value below Rs. 5,000, and the regular appeal, therefore, lay in the Court of the District Judge.

The plaintiff is the Manager under the Court of Wards on behalf of the sons of the late Rajah Protap Chunder Singh, and the title under which the plaint was filed was that of mowroseedar and also mokurrureedar or dur-mokurrureedar as to certain lands situated in several villages which had formerly been granted, in what is called "Kasheer Brittee," by Ranee Bhowany, which grant had been afterwards resumed by the Government and made into a separate estate, of which settlement was granted to one Gobind Monee, a representative of the former sevait of the endowment. The plaintiffs, that is to say, the parties whom the plaintiffs represent, are also the zemindars of the estate out of which this endowment was carved, and the defendants, with whom the real struggles have been, and who are called Bhuttacharjees, are the holders of a mokurruree tenure created by persons called the Roy defendants, and these Roys, it appears, held the double position of putneedars and of mokurrureedars under the mokurruree held by the Rajah, the predecessor of the plaintiffs. The tenure so held by Kali Kant Roy, the predecessor of the Roy defendants, was sold for arrears of rent in 1265, and the ostensible purchaser at that time was one Gobind Chunder Roy. He again was sold out in 1270, five years afterwards, and the tenure was then purchased by the plaintiffs' predecessor, who thus united in himself the superior and inferior titles under the zemindar as to the "Kasheer Brittee" lands. On seeking to take khas possession of this land, the plaintiff was obstructed by the Roy defendants in 1270; a fresh attempt to take possession was made in 1275—the Bhuttacharjees having intermediately acquired their tenure under the Roys, and this suit is now brought against both these sets of defendants to recover possession of the land.

The principal plea set up by the Bhuttacharjee defendants was, that the suit of the plaintiff was barred by reason of more than twelve years having elapsed since the cause of action accrued; but in regard to that it was not suggested, nor does it appear from the evidence, at what time the plaintiff or the plaintiff's predecessor in estate was dispossessed from the land in dispute other than at the time stated in the plaint. There is a good deal of evidence on the record to show that

the Roys were in possession of the mokurruree down to the year 1270. A question has arisen whether, as respects the period between 1265 and 1270, the possession was really with the ostensible purchaser, Gobind Chunder Ghose, or it remained with the Roys; and upon that point the defendants rely upon a decision of the Sudder Ameen's Court of 1860, where both parties were sued for rent, and the Court held that there was no evidence to show that Gobind Chunder held benamee for the Roys, and judgment was, therefore, given against Gobind Chunder alone. That has been relied upon as concluding the plaintiff in the present suit. It appears to us that it is not so. That was a suit for rent. It was not a suit brought for the express purpose of determining as between Gobind Chunder and the Roys, which of them was entitled to the under-tenure. It was a suit improperly, and I may say ignorantly, framed as against both these parties by the landlord, and the Court having merely to give a decree for rent, and not having before it any evidence as to the liability of the Roy defendants, was satisfied with the evidence given against Gobind Chunder, who did not appear, and who was apparently the registered tenant. It appears to us that that is not a binding evidence in the present suit so as to determine, as between the plaintiff and the representatives of the Roys, whether they were or were not in possession. But upon the evidence adduced in the lower Court, which evidence is absolutely unrebutted, undisplaced by the defendants, we think there is no reason whatever to doubt that the Roys were really and continued to be really in possession of this under-tenure notwithstanding the sale in 1265. Looking at the circumstances which took place at the time of the survey and the conduct of the Roy defendants throughout, we have little doubt that those circumstances were planned by them with a view ultimately to dispossess the Rajah as mokurrureedar of this "Kasheer Brittee" estate, and that they finally allowed the under-tenure to go up to sale in 1270, when they supposed that sufficient measures had been taken, and that they were in a position to retain the land; and it seems not unlikely that, but for the officers of the Court of Wards, this attempt might have been successful. There is no reason for supposing that the cause of action arose before 1270. If it were otherwise, a very serious question might arise as between the plaintiff and the defendants on account of the equity which the case presents. As in our opinion the Roys were actually holding and enjoyi this under-tenure down to the year 127 it follows that they were in possession the same time of the rights of the zemind of the parent estate, and also of the hold of the Brittee, and they would find it exce ingly difficult to resist the claim of predecessor of the plaintiff to be put possession of that separate estate after conclusion of their occupation of the t estates together. On all these grounds appears to us that the plea of limitati altogether fails. Then we are asked consider whether the plaintiff has or has n made out a title; but that appears to us to b little more than a piece of vexatious oppos tion. The "Kasheer Brittee" was, it appear made up of a large number of small plots land distributed over a large number kismuts. It was, therefore, a matter of co siderable difficulty to make out title an estate so composed, and the Court woul it might be expected, make allowances such difficulty; but it appears that the Co below had recourse to the usual means enquiry in such cases. An Ameen was se to the spot, provided with chittas, which we part of the proceedings at or immediate after the resumption, and in which the plo described by the Government officers ma be taken to have been detailed with reaso able accuracy. The result of the Ameen enquiry was that, in regard to a larg quantity of the lands claimed, the identi with the resumption chittas was shown; th in regard to some the lands were not capabl of correct identification, and in regard t some the Ameen recommends, and the Court, in accordance with that recommendation, determines, that the plaintiff's claim shoul be thrown out. But the plaintiff's cas rested, not on the Ameen's report alone, bu also upon the evidence of a number o witnesses who were called for the purpos of describing the lands. On the whole, regard being had to the nature of the case, and to the fact that the evidence, so far a it was available on this part of the case, wa on one side only, it appears to us that th plaintiffs' case was properly supported, an that there is no reason for disturbing th decision arrived at by the Court below. Baboo Mohiny Mohun Roy addressed us shortly upon the subject of mesne-profits, and suggested to us that the plaintiff was not equitably entitled to retain the verdict which he got as to damages, because it appears from the Ameen's enquiry that he had got into possession of some land to

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hich he was not entitled, and that he ought make restitution of such land and of the esne-profits before he could get damages account thereof. But this objection was t laid before the Court below, and it seems us impossible that we can enter into it at is stage of the proceedings. It is impossible to say whether, upon a consideration of l the facts that might arise if an issue of at sort were framed, the plaintiff's verdict ght to be reduced or not. We must therefore decline to enter into that question, and old the verdict as it stands. The appeal dismissed with costs.

The 2nd December 1875.

Present:

he Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

pecial Appeal—Inadequate Inquiry—Remand.

Case No. 67 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 30th November 1874, reversing a decision of the Sudder Moonsiff of that District, dated the 30th March 1874.

Shagur Chunder Shaha (Plaintiff), *Appellant,*

versus

Sreemutty Mohamaya (Defendant), *Respondent.*

Baboos Doorga Mohun Dass and *Lall Mohun Dass* for Appellant.

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Respondent.

The Lower Appellate Court's judgment in this case was set aside in special appeal, on the ground that a most inadequate inquiry had taken place, and that Court was directed to complete the inquiry.

Jackson, J.—It appears to us evident that, if serious failure of justice has not taken place in this case, at any rate the Court has not exhausted all the means of inquiry for arriving at the truth. The circumstances are peculiar: The plaintiff brought this suit against the defendant, a female purdanasheen, for the recovery of Rs. 655, being the balance of account due as stated in a hatchitta. Evidence was given to show that this hatchitta had been executed, and also to show that there had been dealings between the parties; and that is not denied on the part of the defendant. It appears also that the defendant's account-books exhibit a sum of money due from the defendant to the plaintiff. On the application of the plaintiff praying to examine the defendant herself on oath, and the defendant having also offered to be examined by Commission, it appears that a Commissioner was appointed, who went to the defendant's dwelling-house. There he was met by the defendant's son-in-law, who produced a registered power-of-attorney, enabling him to enter into compromise on her behalf, and in pursuance of his representations, an arrangement in the nature of a compromise was there spoken of, though not formally made, by which the defendant agreed to pay the sum of Rs. 225, and thereupon, at the request of the son-in-law, the Commissioner desisted from examining the defendant. Afterwards the defendant and the plaintiff likewise repudiated this arrangement. Thereupon the Moonsiff proceeded to give judgment in the case as it stood. He was satisfied on grounds which he states in his judgment, that the defendant had really executed the hatchitta, and he accordingly gave judgment for the plaintiff in full. This decision being carried in appeal before the Subordinate Judge of Dacca, that officer observed: "The genuineness of the "hatchitta is all that I have to consider "in this case." He then goes into the circumstances of the compromise and the proposal of compromise, and he says: "The plaintiff himself does not say that "the proposal of compromise was with the "knowledge and permission of the defend-"ant. In short, it is clear that the defend-"ant had no knowledge of what the wit-"nesses tried to do, and that she never gave "consent to it."

Now, if Hindoo ladies are to be permitted to carry on business, to employ agents in the transaction of that business, to give persons nearly connected with them powers-of-attorney under which agreements are to be entered into on their behalf, and afterwards to repudiate those agreements on the ground that they had no personal cognizance, we are unable to see how business can be carried on. The Subordinate Judge does not inquire into, or notice the effect of, the power-of-attorney. He goes on to consider the evidence of the execution of the hisab hatchitta, and after discussing the evidence on that point says: "The facts relating to the "proposal of compromise, as elicited by the "evidence of the witnesses examined by the "Moonsiff, go to a great extent to show that

"the defendant never signed the hatchitta. "There might be some debts of defendant's "husband, and the witnesses who endeavoured "to pay Rs. 225 to plaintiff did so in consi-"deration of that debt. But it seems to me "clear that the defendant never executed "the hatchitta and acknowledged the debt of "Rs. 616 as claimed by the plaintiff." Then he says: "My reason for such conclusion "is that, if the defendant had, in fact, signed "the hatchitta and acknowledged the debt, "the witnesses who proposed for a compro-"mise would not hesitate to go to the "defendant direct, and require her to give "her consent to it." Another observation that he makes is: "The defendant was ready "to state on oath that she never permitted "anybody to sign her name. A Commis-"sion was issued for her examination, which "was returned unexecuted without the "defendant's knowledge." We are quite at a loss to see what warrant the Subordinate Judge had for making these statements. We should rather be inclined to say that the more reasonable inference to be drawn from the defendant's conduct, when she said she was ready to be examined on oath if examined by Commission, but shrunk from that trial as soon as the Commissioner went to examine her, was against rather than in her favour. It appears to us that the reason given by the Subordinate Judge for coming to a conclusion against the hatchitta is exceedingly meagre, and, when we add that he entirely omits a consideration of the history of previous dealings between the parties, that he omits to refer to the defendant's account-books, or to the account-books of the plaintiff either, and confines himself merely to the question of the execution of the hatchitta, that he has allowed the proceedings to stand where they were without allowing the remaining witnesses of the plaintiff, who were present in Court and not examined by the Moonsiff, an opportunity of being examined, it is quite clear that a most inadequate inquiry has taken place, and that the judgment cannot be allowed to stand. The judgment is, therefore, set aside, and the Lower Appellate Court is directed to complete the inquiry, giving plaintiff an opportunity of examining his remaining witnesses if it appears that they were in attendance. The defendant should also be examined, and the accounts of both parties should be taken into consideration. The costs of this appeal will abide the result.

The 2nd December 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Documents—Resumptions—Witnesses—Appellate Courts.

Case No. 54 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly dated the 28th September 1874, reversing a decision of the Moonsiff of Serampore, dated the 25th April 1874.

Gopee Nath Mookerjee (Plaintiff), *Appellant,*

versus

Boddhumunt Mal and others (Defendants), *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Juggut Chunder Banerjee for Respondents.

A Court should refuse to allow documents to be put in as evidence when filed at a very late stage of the case.

Where a Moonsiff pronounces an opinion as to the authenticity of certain documents, the Appellate Court must assume that he did his duty and looked into each and every one of them before pronouncing such opinion.

On a question of simple credit to be given to a witness, an Appellate Court having before it merely written depositions is not authorized to set aside the opinion of the Court of first instance which heard the witness and recorded that his demeanour was not satisfactory.

Jackson, J.—It appears to us that several of the grounds of special appeal set forth in the appellant's petition are sufficiently made good, and that, taken together, they do amount to an erroneous dealing with the

nce so as to be sufficient to vitiate the ment of the Subordinate Judge revers- hat of the Moonsiff. The Subordinate e, in one passage of his judgment, lays a proposition of law which, although does not adhere to it throughout his ment, yet indicates very strongly the t of view in which he regarded the nce in this case. He says: "No ht can be ascertained only by oral evi- nce in the absence of any documentary idence." Now, looking at the particular re of the present suit, that was a view ch was of necessity most injurious to plaintiff; because what the plaintiff had ertaken to do was a matter of extreme ulty, *viz.*, to establish the right and title his judgment-debtor in certain lands ch were said to be in the possession and yment of other persons who were tions of the judgment-debtor; and under circumstances it was impossible that the ntiff should be in possession of document- evidence bearing upon that matter. en we find that a good deal of discussion taken place in the lower Court in rd to certain documents filed by the endants at a very late stage of the case. does not appear precisely what weight Lower Appellate Court gave to this idence, but the mind of the Subordinate dge must have been influenced by these cuments in some way, as is evident from elaborate reasons given for supporting ir credit. As to these documents, we are nd to say that the proper course for the onsiff to take was to refuse to allow them be put in. The Moonsiff observed that y did not come from proper custody. is has been contradicted by the Subor- nate Judge without any valid reason, as seems to us, for such contradiction. ey are documents which apparently ought have been in the custody of the defendants emselves. They are documents of their her, and there is no reason why they ould have come from the custody of the fendant's uncle, and should not have been own to, or thought of by, the defendants rlier. If they had been excluded, as we ink they should have been by the Moonsiff the first instance, this question as to the stody could not have arisen in the Lower ppellate Court. Then it is contended, and pparently with reason, that the Lower ppellate Court has entirely omitted to otice an important admission made by the efendant in his examination on oath; and ther complaint which also appears to be well founded is that the Subordinate Judge says of the Moonsiff: "The lower Court, "on looking into the condition of one or "two documents, suspected all documents "to be spurious, and accordingly rejected "them. This is not consistent with reason." Certainly it is not. It amounts to a serious charge against the Moonsiff, for which no foundation is shown to us. We must assume that the Moonsiff did his duty, and did look at each and every one of the documents before he pronounced an opinion as to their authenticity.

The Moonsiff himself says that he comes to his conclusion on examining the documents carefully, and the Lower Appellate Court was bound to give credit to this statement of the Moonsiff. Besides that, the Lower Appellate Court, it appears to us, has taken a course which is open to grave objection. The witnesses were examined before the Moonsiff. The Subordinate Judge says: "The lower Court did not believe "the evidence of the said witness, inasmuch "as his demeanour, at the time of his giving "evidence, was unsatisfactory. But, on a "perusal of the depositions of the said wit- "ness, it appears to me that he has spoken "all the particulars from beginning to end in "a very straightforward manner, and I do "not disbelieve his evidence," so that, on a question of simple credit to be given to a witness, the Subordinate Judge, who merely had the written depositions before him, actually sets aside the opinion of the Moonsiff who heard the witness, and who records that the demeanour of the witness before him was not satisfactory. It would be a very unsafe, and we think placing a great deal too much power in the hands of an Appellate Court, to authorize its coming to an opinion of that sort upon the mere written testimony of a witness. All these matters taken together lead us to believe that the Lower Appellate Court has not, in this case, dealt properly and judicially with the evidence before it, and that the lengthy comments which we find diffused throughout the judgment are not a proper adjudication on the merits. We set aside the judgment of the Lower Appellate Court, and order that the case be tried *de novo*. The costs will follow the result.

The 2nd December 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Special Appeal—Objections.

Case No. 62 of 1875.

Special Appeal from a decision passed by the Judge of Jessore, dated the 5th October 1875, affirming a decision of the Officiating Moonsiff of Narail, dated the 26th May 1874.

Baker Mahomed and another (two of the Defendants), *Appellants,*

versus

Seetul Chunder Sircar (Plaintiff) and others (Defendants), *Respondents.*

Baboo Bungshee Dhur Sen for Appellants.

Baboos Nulleet Chunder Sen and *Taruck Nath Palit* for Respondents.

An objection not taken at earlier stages cannot be allowed in special appeal where it would be a surprise on the plaintiff.

Jackson, J.—The point which is argued before us to-day is that the defendants were entitled to use in the way of *res judicata* a previous decision between them and the plaintiff in which it was found that they were not the plaintiff's burgadars. Now, it does appear that there was a previous judgment between these parties in which the plaintiff's claim for rent was thrown out; but whether that was an adjudication upon the question of burga or not, it is quite clear that the defendants never set it up in that way in the Court of first instance, nor in the Lower Appellate Court did they rely upon it as such. To take that objection now as a matter of special appeal would be a surprise on the plaintiff, which ought not to be allowed. It is also suggested that the Judge did not believe the evidence adduced by the plaintiff to show that he held a superior tenure; but that, we find, is not the case. The Judge makes remarks upon the appearance of the documents, but does not say that the plaintiff failed to prove his case. On the contrary, he says that the plaintiff does prove it. The special appeal is dismissed with costs.

The 2nd December 1875.

Present:

The Hon'ble Louis S. Jackson and W. McDonell, *Judges.*

Rent—Notice of Enhancement.

Case No. 79 of 1875.

Special Appeal from a decision passed the Judge of Hooghly, dated the 17 December 1874, affirming a decision the Moonsiff of Oolooberiah, dated 20th July 1874.

Sagur Mundul (Defendant), *Appellant,*

versus

Mohendro Nath Biswas (Plaintiff), *Respondent.*

Baboos Gopal Lall Mitter, Mohinee Mo Roy, and *Umbika Churn Banerjee* Appellant.

Baboos Hem Chunder Banerjee and *Bh anee Churn Dutt* for Respondent.

A suit for enhancement of rent cannot be maintai upon a notice which was so defective in form as preclude the tenant from making a defence.

Jackson, J.—We have not been free fr doubt in this case, because the notice and so-called plaint are certainly upon the bord of what have been frequently held to notices bad in law; and if it were clear th in consequence of the form of that notice, th defendant had been precluded from makin his defence, we should certainly have thoug it our duty to dismiss the plaintiff's suit, how ever hard the result might have been to th plaintiff. But in point of fact we observe tha upon the three grounds on which enhance ment has proceeded, the defendant did mak an effective defence. One of those ground in fact, *viz.*, that on the difference of measure ment, seems rather to have been started b the defendant himself than by the plaintif for it was he who had set up the alleged ha of 20 inches which he failed to prove. The as to the enhanced productiveness of th soil and the prevailing rates, those tw grounds, no doubt, are, to a certain exten mixed up, but they are in fact proved by th same witnesses, and it would seem that th rents now paid by the tenants of like clas occupying similar lands were the resul principally of improvements effected by th landlord from which the defendant as well as the other tenants have derived benefit of the

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soil. We think, therefore, that, as regards the substantive relief accorded to the plaintiff, we ought not to disturb the decision of the Courts below, although we are not satisfied with the cavalier treatment the case has received at the hands of the Judge. But we also think that the notice served upon the defendant in this case was one of a very perplexing character, and that the plaint was not sufficiently specific and certain, and for that reason we think that we ought not to make the defendant pay the costs of the plaintiff in any part of the proceedings.

The 7th December 1875.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Rent-suit—Intervenor—Act VIII. of 1859, s. 73—Appeal—Appellate Court.

Case No. 454 of 1875.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Tirhoot, dated the 17th December 1874, modifying a decision of the Moonsiff of Hazeepore, dated the 28th July 1874.

Kanhye Roy (Plaintiff), *Appellant,*

versus

Shaikh Hyder Buksh (Defendant), *Respondent.*

Moonshee Serajul Islam for Appellant.

Messrs. M. L. Sandel and *J. Younan* for Respondent.

In a suit for arrears of rent, where an intervenor claimed to have been in the receipt and enjoyment of rent of the larger share, and alleged that plaintiff was entitled to rent of only a smaller share, HELD that the intervenor was properly made a party to the suit.

The Lower Appellate Court, on appeal, can set aside the whole decree, although the appeal is only on behalf of the third party, *viz.*, the intervenor.

THE plaintiff is the special appellant in this case. He claimed rent from the defendant No. 1 for the years from 1278 up to the 12-annas kist of the year 1281 according to a wasil-bakee account. The defendant No. 1, the ryot, appears to have disputed the plaintiff's claim to receive rent to the extent of an 8-anna share. Hyder Buksh, the defendant No. 2, who was made a party by the first Court under the provisions of section 73 of Act VIII. of 1859, alleged that he had been in the receipt and enjoyment of rent of the 12-anna share, and that the plaintiff is only entitled to receive rent of the 4-anna share. The first Court found for the plaintiff. The second Court, the Subordinate Judge of Tirhoot, reversed the decision of the Moonsiff. I may observe here that Hyder Buksh alone appealed to the Subordinate Judge, but why, does not appear from the record. The Subordinate Judge says that the point for determination in this case is not the question of title which was entered into by the Moonsiff, but the enjoyment and receipt of rent for the previous years. He finds from the evidence adduced by the plaintiff that he has entirely failed to prove the fact of his being in receipt of rent during the previous years to the extent of an 8-anna share, and that all the witnesses examined by him are those who were appointed by him for collection of rent in the same year for which this suit for rent is brought, and they know nothing as to the share of rent received by the plaintiff in the previous years. It is therefore evident, the Subordinate Judge finds, that the plaintiff could not make out his case by showing that he was in enjoyment of rent from the ryots to the extent of the share claimed, namely, 8 annas. Then he goes to the defendant's case, and says that Hyder Buksh, the intervenor, is purchaser of the village from before the plaintiff's purchase, and that the evidence of the ryots who pay rent is in his favour, and also that the evidence as to his receipt of rent to the extent of a 12-anna share is more strong and reliable than that of the plaintiff. The Subordinate Judge therefore modified the decision of the Moonsiff, finding that the plaintiff has not proved that he was in enjoyment of rent to the extent of the share alleged by him, and declared him to be entitled to receive rent to the extent of a 4-anna share, and not to the extent of 8 annas, leaving the question of title between the plaintiff and the objector to be decided in a regular suit.

Four grounds of special appeal have been pressed before the Court: *first*, that the suit being one for rent, the intervenor ought not to have been made a party to it; *second*, that the Court of first instance having given a decree in favour of the special appellant against the ryot, the Subordinate Judge was wrong in reversing the whole decree of the Moonsiff, and in dismissing the claim of the special appellant as against the ryot; *third*,

that there has been a mis-trial in the case; the Lower Appellate Court has altogether omitted to consider the documentary evidence filed by the special appellant, which was relied upon by the first Court; *fourth*, that the Lower Appellate Court is wrong in holding that there was no evidence with regard to the receipt of rent for previous years, inasmuch as the jummabundee filed by the special appellant was, if considered, sufficient and good evidence of receipt of rent for the previous years.

With reference to the first ground of appeal, the special appellant has referred the Court to a decision to be found in the 24th Weekly Reporter, p. 261. In that case, as far as the facts can be gathered from the judgment, it appears that the learned Judges who decided the case held that the intervenor in that case had no right to be made a defendant in the suit, or to introduce in the suit an entirely new issue, *viz.*, an issue concerning title between himself and the plaintiff; still less was he entitled singly to appeal to the District Judge against the judgment of the Moonsiff. A decision has been referred to on the other side, which is to be found in the 8th Bengal Law Reports, p. 196,* and other decisions in which third parties had been made defendants in rent-suits under the provisions of section 73 of Act VIII. of 1859. It is impossible for me, from the judgment of the case in the 24th Weekly Reporter, p. 261, to know what were the particular circumstances of that case. In the present case I think that the intervenor was properly made a party to the suit; and further I observe that the plaintiff himself allowed the Court to raise an issue between him and the intervenor, which covered the whole point in issue between them, namely, whether the plaintiff was in enjoyment of rent to the extent of 8 annas as alleged by him, or to the extent of 4 annas as alleged by the intervenor. The first ground, therefore, is untenable, and must be overruled. With regard to the second ground that the Lower Appellate Court has reversed the decision of the Moonsiff, not only with reference to the intervenor, but also with reference to the ryot, the decision in the 8th Bengal Law Reports, p. 196, also provides that the Lower Appellate Court, on appeal, can set aside the whole decree, although the appeal is only on behalf of the third party to the suit, *viz.*, the intervenor. That objection is, therefore, also overruled. With reference to the third objection, the Lower Appellate Court did not consider, and very properly did not consider, the documentary evidence filed by the plaintiff in support of his title, because the question of title could not be tried in this suit; the only question to be tried was as to the enjoyment of rent of the previous years. With reference to the fourth ground, although the jummabundees were not alluded to by name in the decision of the Subordinate Judge, it is very clear that he must have considered those jummabundees, because he says that the witnesses who were appointed by the plaintiff for the collection of rent, *viz.*, the patwaries, and who must have been examined with reference to the jummabundee papers before they can be admissible, knew nothing as to the share of rent received by the plaintiff in the previous years. On the whole case, therefore, I am of opinion that the decision of the Subordinate Judge is perfectly correct in law.

The special appeal must be dismissed with costs.

* 16 W. R. (Civ. Rul.), p. 235.

The 10th December 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Judge of Appeal—Jurisdiction.

Case No. 200 of 1875.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 22nd December 1874, modifying a decision of the Moonsiff of Jhenidah, dated the 24th March 1874.

Shetabdee Biswas and another (Defendants), *Appellants,*

versus

Molamdee Mundul (Plaintiff), *Respondent.*

Mr. H. E. Mendies for Appellants.

Baboo Bunshee Dhur Sen for Respondent.

A Judge of appeal is not in the position of an arbitrator, who has to look at the evidence on both sides and determine which is preferable. He has to deal with the decision of a properly-constituted Court, which, if not shown to be erroneous, ought to be affirmed.

Jackson, J.—THE judgment of the Additional Judge in this case has not been arrived at on judicial principles, and cannot be

held. The Judge observes : "This is not a case where there appears a possibility of arriving with certainty at its rights, and I can only, in determining it, hope that I am arriving near a correct conclusion. Evidence as to continuous prior possession would determine the case, but that is forthcoming for both sides, not equally, but still of a nature that would preclude my confidently determining the continuous possession of either side to have been really made out." The Judge appears to be under the impression that he has to look at the evidence of both sides and determine which is preferable. The fact is that ordinarily the burden of proof is on the plaintiff, and in the present case the plaintiff had first to show that the land he claimed was comprised in his pottah. The Judge goes on to say : "When I turn to the valuable evidence of the thakbust map, I am again at a loss, for the local examination by the deputed Ameen results in the land being mapped out apparently not in agreement with the thakbust map ; the Ameen apparently thinking that the features of the land, when the thakbust map was made, were such as to render certain points of somewhat doubtful exactness. However, both from the oral evidence and from the thakbust map's details, it would appear to me that there is ground for fixing the joining point of the three villages at the north-west corner of Goriboollah's land, rather than where the Ameen, by his measurements from 'bearings,' has brought it, which is apart from Goriboollah's land ;" and he then says : "Taking this north-west corner of Goriboollah's land as an ascertained point, and as our only ascertained point, we may determine with fairness and with a saving of unnecessary expense or of fresh ground for dispute that a line be drawn westward from the north-west corner of Goriboollah's land to a point on the western boundary of the land in dispute which is equidistant between the northern and southern boundaries of the land in dispute, and that the land lying to the north of that line be assigned to the plaintiffs, and the land to the south of that line, to the defendants." So that he arrives at some sort of guess on what the decision ought to be. Having done that he says : "I cannot say that the defendant's counsel appear to have much to say against it ;" and then proceeds : "I do not presume to say that this finding is quite correct ; but taking the detail given in the thakbust map with oral evidence adduced and with the relative positions of Goriboollah's land and 'Alum's land,' I do not find that I can agree with the Ameen's position of the joining points of the three villages, and not accepting that which has been accepted by the lower Court, I think that the conclusion which I have arrived at is as fair a one to both parties as could be arrived at under the circumstances." The Judge puts himself in the position of an arbitrator and not of a Judge of appeal. He had to deal with the decision of a properly-constituted Court, and it was his duty either to affirm or set aside that decision. If the decision is not shown to be erroneous, he ought to affirm it. The case must accordingly go back to the Lower Appellate Court for the purpose of a fresh decision. The costs of this appeal will abide the result.

The 10th December 1875.

Present :

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Certificate of Estate—Joint Family.

Case No. 257 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 26th January 1875.

Ram Golam Sahoo (Petitioner), *Appellant,*

versus

Jankee Pershad Sahoo and others (Opposite Party), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Respondents.

Where a certificate of administration was granted to certain applicants who asked it with reference to a particular debt, putting in a bond of the judgment-debtor, and showing that they were joint in estate with

the deceased, the certificate was held to have been rightly granted, and to have been properly refused to another member of the family who had separated from the deceased.

Kemp, J.—In this case we arrive at the same conclusion as the Judge has done, but we do not accept the reasons given by him for his decision, and we trust that he does not mean to give effect to the intention expressed in his decision, *viz.*, "to grant to each of a number of rival claimants a certificate to collect particular debts due to one and the same estate." In this case, Ram Golam Sahoo, the appellant before us, applied for a certificate to be granted to him alone, setting forth that he was the heir of Imrit Lall. On the other side, Jankee Pershad Sahoo and Mungul Pershad Sahoo applied for a certificate, stating that, under an ekrarnama, dated the 26th August 1868, Ram Golam's father was separated from the other members of the family, and that Imrit and the sons of Kunhya, the respondents before us, remained joint in estate; that, at the time of the death of Imrit Lall, a sum of Rs. 525 was due to him under a bond executed by Oodit Lall and Aumool Lall, the date of that bond being the 25th of November 1870; that they applied for a certificate to enable them to collect this debt, and filed the bond. The order of the Judge was that a certificate was to be granted to them to enable them to collect the debt mentioned in the petition, namely, the debt due by Oodit Lall and Aumool Lall, and that the certificate was to be confined to that particular debt. They also supported their application by filing the ekrarnama alluded to above, a deed-of-gift from Imrit Lall to the sons of Kunhya, a mutation-proceeding under that heba, and many other documents. The appellant before us, after applying for a certificate for himself alone, subsequently put in an objection to the opposite party obtaining a certificate, on the ground that, although he admits that he was separate from Imrit Lall in estate, he also alleges that the other applicants for certificates were also separate, and not joint, and therefore, that he, Ram Golam, being as near relation to the deceased, Imrit Lall, as the opposite party, there was no reason why he should not be allowed to have a certificate as well as the parties to whom a certificate has been granted by the Judge. The Judge, we think, has very properly refused to grant a certificate to Ram Golam. As shown above, it is clear that Ram Golam admitted that he was separate from Imrit Lall, and the hebanama filed by the opposite party recites that Imrit Lall had separated from Ram Golam, and that he was joint in estate with the sons of Kunhya, who are the parties to whom the certificate has been granted. Therefore, looking to the fact that they asked for a certificate to collect a particular debt, that they put in the bond of the judgment-debtor, and that they were joint in estate with Imrit Lall, we think that the Judge was right in granting the certificate to them, and in refusing to grant a certificate to the appellant, Ram Golam, who can establish his title, if he has any, in a regular suit.

The appeal is dismissed with costs.

The 10th December 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Marriage Contract—Consideration—Public Policy.

Case No. 263 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 5th October 1874, affirming a decision of the Moonsiff of Serampore, dated the 5th June 1874.

Ranee Lallun Monee Dossee and another (two of the Defendants), *Appellants,*

versus

Nobin Mohun Singh (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee, Bhowanee Churn Dutt, and *Mohinee Mohun Roy* for Appellants.

Baboos Unnoda Pershad Banerjee, Mohesh Chunder Chowdhry, Rash Beharee Ghose, and *Aubinash Chunder Banerjee* for Respondent.

Where a Hindoo, contracting a second marriage, agreed to confer, on the party whose sister was to be his second wife, a talook which was to be carved out of his estate, and, until it was carved out, to make a yearly payment of a fixed sum:

Held that the undertaking was for ample consideration, and was not opposed to public policy.

Jackson, J.—We have no doubt that the judgment of the Court below is substantially

orrect in this case. It appears to us that his document, on which the plaintiff's case ests, having been executed more than fifty ears ago, it is a great deal too late now to nquire whether there was consideration for he deed, and even if there was any, whether he agreement is not contrary to public olicy. But it appears to us that, even if here were any necessity for entering into hat enquiry, there is ample consideration, nd we are far from thinking that there is nything opposed to public policy in the ndertaking which Hurish Chunder Roy xecuted. From the language of the neum atro, we have no doubt that the marriage rith which this agreement is connected was hen quite recent, otherwise he would not ave set out the cause which induced him to ontract the second marriage. He says: 'Inasmuch as there is no probability of my 'having any issue by my senior wife, there-'fore I marry your younger sister;" and hen he says: "In consideration of your 'high social position and the usage of our 'family in such circumstances, I agree to 'confer upon you a talook which is to be 'carved out of my estate, and of which you 'are to have full enjoyment with liberty to 'alienate, and of which the profits will be 'enjoyed by you after payment of the rent 'reserved, and, until such talook is not 'carved out, I will pay you yearly the sum 'of Sa. Rs. 480." There is evidence to how that, during the last fifty years, the plaintiff and those he represents have enjoyed nd have received the moneys stipulated for nder this agreement. Under these circumstances, it appears to us that the plaintiff was fully entitled to insist upon and ask for the aid of the Court in recovering what was due thereunder. It has been suggested that there was something here in the nature of a perpetual covenant. We think that the plaintiff here is just in the same condition as if the putni contemplated had been actually created, and he had attempted to undo that which had been done. This, no doubt, was not actually carried out, but the money allowance so stipulated for has continued to be paid, and has been recovered under decrees of Court from that time until now. It appears to us that the defendants are not at liberty under the circumstances, and at this late period, to attack the origin of the contract and ask the Court to allow them to repudiate it. The special appeal will be dismissed with costs.

The 10th December 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Act VIII. of 1859, s. 243—Manager.

Case No. 213 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 5th June 1875.

Baboo Doorga Dutt Singh (Judgment-debtor), *Appellant,*

versus

Baboo Bunwaree Lall Sahoo (Decree-holder), *Respondent.*

Mr. Branson and *Baboo Aubinash Chunder Banerjee* for Appellant.

Mr. M. L. Sandel and *Baboo Mohesh Chunder Chowdhry* for Respondent.

Where a Judge, on the death of a manager appointed under Act VIII. of 1859, s. 243, reviewed the progress made, and finding that, under such management, the decree was not likely to be satisfied for a very long time, directed execution to proceed against the estate, HELD that his discretion had been properly exercised.

Kemp, J.—We think this appeal must be dismissed. The Judge, in the exercise of the discretion vested in him under section 243 of Act VIII. of 1859, has thought proper, on the death of a manager appointed under that section, to decline appointing another manager, on the ground that, on a review of the results of the management under the former manager, he found that that management had not worked satisfactorily. He, therefore, directed execution to proceed against the property.

On appeal, the ground taken is that the Judge ought not to have set aside the arrangement made by his order of the 9th March 1874 under the special circumstances of the case. The decree was originally for a very large sum of money, namely, Rs. 3,80,000; and it appears that Rs. 3,36,183-6-6 have been satisfied, and there remains a debt of upwards of Rs. 43,000.

It appears that, after the appointment of the surburakar, who, we may observe, was appointed by the same Judge who now thinks it right not to appoint a new manager on the death of the former one, the decree-holder complained that, looking to the collections made in the 13 months after the appointment of the surburakar, a sum of Rs. 6,449-8 only had been realized, and

after deducting certain expenses and interest on the amount due, there were only Rs. 3,731-5-3 available at the end of that period towards the payment of the principal due under the decree; and that it was not likely that, under such management, the decree could be satisfied for a very long time. He, therefore, asked for the removal of the surburakar. There were also complaints on the part of the manager that the judgment-debtor interfered with the management, and also neglected to produce the jummabundee papers and other necessary information to enable him to collect the rents. Upon this, the Judge ordered that the whole thing should be reviewed on the 31st of May 1875; and, on the 5th of June, after considering the progress made by the past management in satisfaction of the decree, he came to the conclusion that it would not be advisable to continue that management; and we do not think that, in the exercise of the discretion vested in him under section 243, the Judge has acted improperly in passing his order of the 5th of June.

The appeal must be dismissed with costs.

The 10th December 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Execution-sale—Postponement.

Cases Nos. 265, 266, and 267 of 1875.

Miscellaneous Appeals from an order passed by the Subordinate Judge of Gya, dated the 24th July 1875.

Noorul Hossein and others (Judgment-debtors), *Appellants,*

versus

Musst. Omatool Fatima and others (Decree-holders), *Respondents.*

Mr. M. L. Sandel and *Moonshee Serajul Islam* for Appellants.

Baboo Boodh Sen Singh and *Moonshee Mahomed Yusuf* for Respondents.

Where an execution-sale, after proclamation made, was postponed for a month at the instance of the judgment-debtor who agreed not to object to the sale (should it eventually be necessary) on the ground of irregularity on this point, HELD that he was bound by his agreement.

Kemp, J.—THE decision of this case will govern appeals Nos. 266 and 267 of 1875, the judgment-debtor being the appellant in three cases. It appears that the judgm debtor made an application in the C below to stay the sale of his property enable him to satisfy the decree, amo ing to Rs. 29,676-7-7, which was sum due to the judgment-creditors. judgment-debtor satisfied the Subordi Judge that he was taking steps to sell property to enable him to satisfy this dec and certain registered deeds were show the Subordinate Judge which satisfied that the judgment-debtor was using his endeavours to pay off the decree. In petition of the judgment-debtor, he ad that the decree-holders had issued the u proclamation, and he says that he will object on any account to the sale taking p by reason of any irregularity on this p if a month's time be given him. On understanding, one month's time was gran and it is recorded that the judgment-cred consented to the postponement of the sal condition that the sale should take place the 15th of April, unless the judgment-de satisfied the decree. The decree was satisfied, and the sale accordingly took pl Now the judgment-debtor comes up appeal and urges that he is not bound by conditions of that petition, and that the C below ought to have taken up the case on evidence adduced by the judgment-deb and found whether any substantial irre larities in the conduct of the sale had ta place so as to cause substantial injury to judgment-debtor. Two cases have b quoted by the pleader for the special ap lant, in Volume VI., Weekly Reporter, M cellaneous, Rulings, p. 84, and in Volu III., p. 11. The case in Volume VI. re to a sale which had been postponed for a c tain time to a certain date, and where the s did not take place on that date, but on a sub quent day, and in that case the Court held t a fresh proclamation and fresh notice ough have been issued. In the other case Volume III., it was held that when a sal execution of decree is postponed *indefinit* the issue of a fresh proclamation un section 249, Act VIII. of 1859, giving no of the time and place of sale is necess In this case the sale was not postponed in finitely: it was postponed for one month the instance of the judgment-debtor un certain conditions, and it took place on date to which it had been postponed. T cases quoted, therefore, do not apply, a these appeals must be dismissed with cos

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The 10th December 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Appellate Court—Evidence—Remands.

Cases Nos. 203 to 211 of 1875.

Special Appeals from a decision passed by the Subordinate Judge of Moorshedabad, dated the 5th December 1874, reversing a decision of the Moonsiff of Hurhurparah, dated the 7th September 1874.

Mr. A. Hills (Plaintiff), *Appellant,*

versus

Osman Biswas and others (Defendants), *Respondents.*

Baboo Kashee Kant Sen for Appellant.

Baboo Bhowanee Churn Dutt, Junior, for Respondents.

Where an Appellate Court finds that all the evidence that is necessary in a case before it has not been recorded, it has power either to require additional evidence to be taken, or to take it itself, and should decide the appeal itself, and not remand it for re-trial by the first Court.

Jackson, J.—THE order of the Subordinate Judge in all these cases is contrary to law. It purports to be a remand under section 351, and the reason alleged is that the case has been decided without evidence being taken on questions of fact. It appears that judgment had been given for the plaintiff in all these suits by the Moonsiff. On appeal the Subordinate Judge says: "As the case has been decided on a preliminary point without evidence being taken on the questions of fact, it should be remanded to the first Court for a trial on the merits." Now, it may be that all the evidence that is necessary may not have been recorded. If so, the Appellate Court has power either to require additional evidence to be taken, or take it itself. It is necessary, therefore, that the Lower Appellate Court should decide the appeal itself, and not remand it for re-trial by the Moonsiff. It is not necessary for us now to say whether the judgment of the Moonsiff was based upon what is sufficient and conclusive evidence or not. That question will come before the Court when the Lower Appellate Court shall have given a proper judgment.

The 13th December 1875.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Separate Payment of Rent—Tenants holding over.

Case No. 2307 of 1874.

Special Appeal from a decision passed by the Officiating Third Subordinate Judge of Tipperah, dated the 10th July 1874, reversing a decision of the Moonsiff of Amaergaon, dated the 15th December 1873.

Mr. J. P. Delauney and another (Plaintiffs), *Appellants,*

versus

Kofilooddeen and others (Defendants), *Respondents.*

Baboos Nullit Chunder Sen and *Bharut Chunder Dutt* for Appellants.

Baboo Sham Lall Mitter for Respondents.

The purchasers of a zemindar's right, by having their shares separately recorded in the Collector's office under Act XI. of 1859, do not acquire any right to alter the position of tenants as regards the manner in which rent is to be paid so long as the latter hold over after the expiry of a settlement.

Macpherson, J.—WE think the decision of the Lower Appellate Court is right.

The plaintiffs sue to recover an eight annas share of the rents of certain lands. Their case is that the defendants held under a temporary settlement for thirty years; that the zemindar's right was purchased from Government by the plaintiffs and one Courjon jointly; and that subsequently an eight annas share of what was so purchased was, under Act XI. of 1859, separately recorded as belonging to the plaintiffs. The plaint states that the term for which the defendants held the tenure having expired, they are no longer entitled to hold the lands, but are liable to pay the rent so long as they remain in possession; and it is prayed that the defendants may be ordered to pay the plaintiffs an eight annas share of the rent. The representative of Courjon, the owner of the other eight annas share, is made a defendant.

The suit is limited to the share claimed by the plaintiffs. There is no suggestion that the (rent-paying) defendants have ever recognized the separate interest of the plaintiffs or of the owner of the other eight annas

share. The rent has never been paid save as one rent for the whole sixteen annas of the tenure; and there is no agreement, express or implied, by the defendants (the rent-payers) to pay one-half of the rent to the plaintiffs, and one-half to the other shareholder in separate payments. We do not see how the fact of the plaintiffs having had their shares separately recorded in the Collector's office under Act XI. of 1859 gives them any right to alter the position of the defendants as regards the manner in which they are to pay the rent. So long as they hold over as alleged in the plaint, it seems to us the rent is payable as it was during the settlement for thirty years which is mentioned in the plaint.

We agree with the Subordinate Judge in thinking that the Full Bench, in the case of Doorga Churn Surma (12 Bengal Law Reports, p. 289),* did not decide that a suit such as this will lie. In that case the tenant has made separate payments of rent to certain of the shareholders; and that makes a most important difference in the position of the parties.

The objection was taken by the defendants (the tenants) in their written statement, and was properly entertained by the Lower Appellate Court.

The appeal is dismissed with costs. And this decision governs Special Appeals Nos. 2308, 2837, 2844, and 2873 of 1874.

The 14th December 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Thak Maps—Evidence—Title.

Case No. 420 of 1875.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 9th December 1874, affirming a decision of the First Subordinate Judge of that District, dated the 27th March 1874.

J. G. N. Pogose and another (Defendants), *Appellants,*

versus

Mokoond Chunder Surma Sircar (Plaintiff), *Respondent.*

Baboo Kalee Mohun Doss for Appellants.

Baboo Sreenath Doss for Respondent.

Thakbust maps, where they are evidence of possession, are also some evidence of title, although not conclusive.

Kemp, J.—THE defendants are the spec appellants in this case. The plaintiff su for declaration of title and possession wi wasilat in respect of 8 annas of Mou Khaisar appertaining to the auction-pu chased talook 72 on the towjee, from whi he alleges that his farmer was ousted Magh 1277. The said farmer having die and the term of his farm having expired the suit is brought by the plaintiff.

The defendants plead limitation; that th land in suit does not appertain to the plaintiff' talook 72, but to their zemindaree, an forms part of their shikmee talook; that th plaintiff has not adduced satisfactory evidenc of his possession; and that the kabooleu filed by him are fictitious.

Both Courts have found for the plaintif The decisions are elaborate, and the Judge after reviewing the whole of the evidence says: "I find that the plaintiff has sa "tisfactorily shown that he has been in po "session of the land claimed within twelv "years, and that he has established clai "to have his title declared and possessio "given." The Judge, it is true, says th the plaintiff has not shown his original titl inasmuch as he has not filed the quinquen nial papers, but he has shown that, at the tim of the thak, which took place many year ago, the four plots, which are now claime by the plaintiff in this suit, were thaked as appertaining to talook 72, with the cog nizance and consent of the defendants. In special appeal no ground is raised that the finding of the Subordinate Judge that the land claimed was thaked as appertaining to talook 72, the plaintiff's property, is er roneous.

Then both the Courts have found that the plaintiff has filed kabooleuts and has produce ed witnesses to prove his possession. In spe cial appeal, it is contended that this is not enough, that the plaintiff ought to have been put to the proof of his title, and that the thakbust proceedings are no evidence of title.

Now, it has been held in several cases which are quoted by the Judge that, where thakbust proceedings, conducted in the presence of both parties, declare the land in dispute to be included in the zemindaree of A, and B seeks to include them in his own zemindaree, B must prove by counter-evidence at what precise time, if ever, he, or

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* 21 W. R., p. 46.

ay one under whom he claims, was in possession. Thakbust maps have been held to e evidence of possession, although not onclusive as to title, and if they are idence of possession, they are also some idence of title. The Judge has held that e defendants have entirely failed to prove eir allegation that the lands which are now laimed are within their zemindaree and hikmee talook. We therefore dismiss this ppeal with costs.

The 14th December 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Suit by Hindoo Widow—Limitation—Act XIV. of 1859, s. 1., cl. 13.

Case No. 53 of 1875.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 22nd September 1874, reversing a decision of the Moonsiff of Panchpookhooria, dated the 7th March 1874.

Krishnadhun Chowdhry (Defendant), *Appellant,*

versus

Sreemutty Hur Coomary Chowdhrain (Plaintiff), *Respondent.*

Baboo Mohiny Mohun Roy for Appellant.

Baboo Nullit Chunder Sen for Respondent.

A suit by a Hindoo widow for possession of a share in certain property alleged to have been held by her husband in joint estate with his brothers was considered to be barred by limitation, because plaintiff was not able to show that she had, at any time within twelve years of the institution of the suit, been in the enjoyment of her share of the profits.

Kemp, J.—The defendant is special appellant in this suit. The plaintiff, a Hindoo widow, sues for possession of a 16 gundas share in certain property, alleging that her husband, Kalikrishna Chowdhry, who died in 1248, was joint in estate with his brothers, and that she was dispossessed by her brothers-in-law in Magh 1274, and she brings this suit in 1279; therefore the suit is brought thirty-one years after the death of her husband, and five years after the alleged ouster.

The defendants allege that the suit is barred; that the plaintiff has never been in possession of the disputed property since her husband's death; and that her husband executed a will bequeathing all his property to his brothers.

The Moonsiff has found that the onus was on the plaintiff, but that she had completely failed to prove enjoyment of any portion of the profits of the joint estate, and that she was bound to do that under the 13th clause of section 1 of Act XIV. of 1859. The words used are: "The plaintiff has completely failed to prove either the one or the other of the facts necessary to be proved in order to save the case from being barred by limitation." These two facts being that she was jointly in possession of the disputed property with the other co-sharers within twelve years of the suit, or that within the same period she received her share of the profits from the person in possession or enjoyment of the property. He therefore dismissed the plaintiff's suit without going into the question of law.

The Judge also, without going into the question of law, and throwing the onus, as we think, upon the wrong party, namely, the defendant, admits that the plaintiff has not been able to show that she has received any profits of the estate, but he asks whether she is to lose her inheritance in consequence of this. He then goes into a long statement as to the unpleasant position of a Hindoo widow at her husband's death, and finds that, although the plaintiff lived away from her husband's house in the house of her parents, she used occasionally to visit the house of her husband's brothers, and that she received food from them during her stay, and that, therefore, her suit is not barred by limitation.

We think this decision is wrong on the Judge's own showing. The suit is brought many years after the husband's death, and five years after the admitted ouster; and according to the Judge's own finding, the plaintiff has not been able to show that she was, at any time within twelve years of the institution of the suit, in the enjoyment of her share of the profits by receipt of the same from any person in possession or enjoyment of the joint estate.

We therefore reverse the decision of the Judge, and restore that of the Moonsiff with costs.

The 15th December 1875.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Special Appeal—Remand—Issues.

Case No. 2437 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 16th July 1874, affirming a decision of the Moonsiff of Nubeegunge, dated the 4th May 1874.

Goluck Chunder Dutt (Plaintiff), *Appellant,*

versus

Anunt Kishore Gossain and others (Defendants), *Respondents.*

Baboo Gopee Nath Mookerjee for Appellant.

Baboo Bharut Chunder Dutt for Respondents.

In a suit to recover possession of an interest in land, where a question of partition, which was the most important issue in the case, had been taken for granted by the Lower Appellate Court, the High Court in special appeal remanded the case for re-trial as to that issue.

Macpherson, J.—THE question here is as to the nature of the plaintiff's interest in certain lands which admittedly belonged at one time to two brothers, Joy Krishna Deb and Raj Krishna Deb.

The plaintiff claims the share which belonged to Joy Krishna which, he says, is an undivided 8-anna share of the whole property.

The defendant, Pubi Dossee (on behalf of the minor widow of her son), claims the share of Raj Krishna; but she says that the shares were partitioned many years ago, and that the lands now held by her separately were allotted (on the partition, by metes and bounds) to the defendant, Anunt Kishore Gossain, who sold them to Ruttun Ra Dhur, who left as his heiress a widow, who is a minor, and who is represented this suit by the defendant, Pubi Dossee, mother of Ruttun Ram. Anunt Kisho Gossain got the share of Raj Krishna gift from him, and then sold to Rut Ram.

The point in dispute is whether, duri the time when the share of Joy Krish was held by his widow, Bhoobunessur and the share of Raj Krishna was held his donee, Anunt Kishore Gossain, a partiti by metes and bounds took place betwe Bhoobunessuree and Anunt Kishore.

The Lower Appellate Court says th there was a partition; but the Court appea to have rather taken it for granted th such was the case, and really disposed the suit on certain other issues as to th position and acts of the defendant, Prokas Chunder. These questions as to Prokas Chunder are of much less importance th the issue as to partition or no partition and this last issue has not been prope tried.

The case is remanded for re-trial as to th matter.

The first issue to be tried is whether th whole or any of the lands for the undivide share of which the plaintiff now sues we partitioned by Bhoobunessuree and Anun Kishore Gossain by metes and bounds.

The Court must find distinctly whethe a partition is proved, and its character, an how far effect was given to it by possession of the lands after partition.

If the Court is of opinion that there wa a partition, then there is a further questio to be considered, namely, whether the parti tion having been made by Bhoobunessuree, she being the heiress of her deceased husband, it was binding on the reversioner. Thi question has been raised, and the plaintiff is entitled to a decision on it. We do not, however, say that the partition is necessarily not binding simply because made by the widow of Raj Krishna.

If the Court is of opinion that the partition was made, and is binding on the reversioner, then the plaintiff's suit will be dismissed.

If, on the other hand, no partition was made by metes and bounds, or if the partition is not valid as against the reversioner, then the plaintiff will be entitled to a declaration of his right to the undivided share claimed.

Costs will follow the result.

The 15th December 1875.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Jurisdiction—Value of Stamp—Value of Suit.

Case No. 2155 of 1874.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 13th June 1874, reversing a decision of the Moonsiff of Nasirnuggur, dated the 21st June 1873.

Chunder Nath Bhuttacharjee (Plaintiff), *Appellant,*

versus

Brindabun Shaha and others (Defendants), *Respondents.*

Baboos Unnoda Pershad Banerjee and *Kalee Mohun Dass* for Appellant.

Baboos Sreenath Dass, Mohinee Mohun Roy and *Bharut Chunder Dutt* for Respondents.

Whether a Moonsiff has jurisdiction or not in a suit depends not on the value of the stamp according to the Rules of the Court Fees Act, but upon the amount or value of the subject-matter of dispute, *i.e.*, the actual market-value of what the plaintiff is suing for.

Macpherson, J.—We set aside the decision of the Judge and remand the case to him for re-trial.

The Judge has held that the Moonsiff had no jurisdiction; but, in so doing, he has applied an entirely wrong principle. The question of whether the Moonsiff's Court had jurisdiction or not depends not upon the value of the stamp according to the Rules of the Court Fees Act, but upon the amount or value of the subject-matter of dispute, *i.e.*, the actual market-value of what the plaintiff is suing for.

That was decided by a Division Bench of this Court in a case reported in 20 Weekly Reporter, p. 33, and the decision is, no doubt, correct. That being so, the question of jurisdiction has been disposed of by the lower Courts on a wholly wrong principle; and the matter must go back accordingly. Of course, if the Judge finds on the evidence, that the amount or value of the subject-matter of dispute in this suit is greater than the amount up to which the Moonsiff has jurisdiction, the suit must be dismissed on that ground. But if he finds that the value is within the jurisdiction of the Moonsiff, he must dispose of the case on its merits.

Nothing has been shown to us to enable us to form any opinion as to the actual market-value of what the plaintiff sues for.

Costs will abide the result.

The 17th December 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Suit by one of several Mortgagees—Undefined Land—Impracticable Decree.

Case No. 2744 of 1874.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 5th August 1874, affirming a decision of the First Moonsiff of Arrah, dated the 2nd March 1874.

Mahomed Ismail and another (Defendants), *Appellants,*

versus

Lalla Dhundur Kishore Narain and another (Plaintiffs), *Respondents.*

Moonshee Mahomed Yusuf for Appellants.

Baboo Anund Gopal Paleet for Respondents.

A mortgagee cannot maintain a suit for khas possession of an undefined area of the mortgaged land without making his fellow-mortgagees parties to the suit.

A suit to recover land without defining boundaries cannot be maintained, because, if decreed, the decree could not be executed.

Kemp, J.—The defendants are special appellants. The suit was for possession of a very small area of land described as khast lands comprised within a holding of 23 beeghas under a zur-i-peshgee.

The defendant alleged that the land in suit is not comprised in the zur-i-peshgee lands but is distinct, and forms portion of the Thika of Sheoburt Lall and others.

The Moonsiff found for the plaintiff, and directed that he be put in possession of the land, the subject of the suit.

On appeal the Zillah Judge has confirmed this decision. He sets forth the grounds of appeal on behalf of the defendant, and then states that "the only question is whether the land in suit is the mortgaged land or not," and on this point he entirely agreed with the Moonsiff and dismissed the appeal.

In special appeal, it is contended that the decree of the Court below is incapable of execution, as the plaintiff has not given the boundaries of the land claimed by him over which he asks for khas possession; and further that the plaintiff is only a 4-anna sharer in the mortgage, and has, therefore, no right to maintain a suit for khas possession of an undefined area of land within another area, the other mortgagees not having joined in the suit. These were the points argued before us, and we are of opinion that the plaintiff's suit in its present form ought to have been dismissed. The other mortgagees representing a 12-anna interest have not joined in the suit, and have not, as far as we can ascertain, been made parties thereto. Further it is impracticable to execute the decree which the Courts below have passed; no boundaries were given of the land claimed by plaintiff, which, as already stated, is a small area within another area. The plaintiff must bring his suit in a proper form, making the co-mortgagees parties, and defining the lands claimed, so that, in case of his obtaining a decree, it can be executed.

The special appeal is decreed, and the plaintiff's suit is dismissed with costs in all the Courts.

The 21st December 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Pleading one's own Fraud.

Case No. 103 of 1875.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 22nd September 1874, reversing a decision of the Moonsiff of Nattore, dated the 3rd December 1873.

Ashruf Sirdar (Defendant), *Appellant,*

versus

Ranee Bhubo Soonduree (Plaintiff), *Respondent.*

Moonshee Serajul Islam for Appellant.

Baboo Bhugobutty Churn Ghose for Respondent.

Where a person who has executed a document (*e.g.*, *a kabooleut*) for his own advantage under false pretences is sued upon it, he is not precluded from showing the real nature of the transaction.

Kemp, J.—THE defendant Ashruf Sirdar is the appellant in this case. The suit was brought by Ranee Bhubo Soonduree arrears of rent on a kabooleut. The am claimed was Rs. 315. The plaint alle that a ryotee *surasury* holding is recor in the name of the defendant at an ann jumma of Rs. 140-10¼ annas on account 166 beeghas 6 biswas and 12 chittacks land in Nij Garfagram.

The defendant states that he has no j jumma; that he has no lands in his pos sion; that the plaintiff has not put him possession of any, and although he adm the execution of the kabooleut filed by plaintiff, he says he did so on a false pr mise held out to him by the plaintiff, rather the plaintiff's son, Rajah Promoth Nath Roy; that if the defendant execute the kabooleut at an enhanced rent and alte ed the collection-papers and obtained simil kabooleuts at enhanced rents from the oth tenants, the plaintiff would take him, th defendant, into her employ, and would ma no demand on him for rent on the basis this kabooleut.

The first Court, in a very elaborate dec sion, found that the defendant was not i possession of the land covered by the kabo leut; that the plaintiff put the defenda into possession of no land; that the defenda is not liable for the rent claimed, and th the kabooleut in question was obtained fro the defendant under false pretences; and th immediately after its execution, the defen ant has been applying for redress agai the terms stated in it in the Criminal a Civil Courts.

On appeal the Judge has held that th defendant is stopped from pleading his ow fraud; that the present case is the case a man who knowingly and willingly exe cuted a document for his own advantage, and that he cannot allow the defendant, when he is sued upon this document, t plead that he executed it under false pre tences for the purpose of his bettering his condition. The Judge considered that th lower Court was also wrong in permittin the defendant to set up any plea of admi sion that he executed the kabooleut unde a false representation, and he reversed th decision of the Moonsiff.

In special appeal the points taken are, that when the Court of first instance found, a a fact, that the defendant held no land under the plaintiff, the Judge was wrong in decree ing the claim, simply on the basis of a kabooleut for which there was no consideration, inasmuch as the plaintiff had not put the defendant in possession of any lands.

econdly, that the Judge has erred in law holding that the defendant is precluded om showing the real nature of the transac-on.

We think that the defendant is not pre-uded from showing the real nature of this nsaction. The case must, therefore, be manded for the Judge to find, as the first ourt has found, whether the defendant olds any lands under the plaintiff on the sis of this kubooleut, and whether the aintiff did put the defendant in possession the lands covered by the kubooleut as the nsideration for it. Costs will follow the sult.

The 1st December 1875.

Present:

he Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

ause of Action—Misjoinder—Code of Civil Procedure, s. 73.

Case No. 285 of 1874.

egular Appeal from a decision passed by the Judge of Dacca, dated the 22nd August 1874.

ahomed Mirza and another (Plaintiffs), *Appellants,*

versus

Khajah Abdool Kureem and another (Defendants), *Respondents.*

aboos Ashootosh Dhur and *Kalee Mohun Doss* and *Moonshee Seràjul Islam* for Appellants.

aboo Doorga Mohun Doss for Respondents.

In a suit against A K for contribution of moneys paid in satisfaction of two decrees under which present plaintiffs and defendants were jointly liable, and one of which decrees was founded on an ekrar executed by the parties to the present suit and by one F, not a party, who was expressly excluded from liability in the decree last mentioned, the Judge, considering that F was liable under the ekrar, but not liable under the bond on which the other decree was founded, decided that there were two distinct causes of action, and dismissed the suit:

HELD that the cause of action on which plaintiffs relied was simply the joint liability of the parties under the decree, and the Judge did wrong in importing a different cause of action; and that, if F was to be brought in as a party to the suit, it could only be done on the application of the defendants under Act VIII. of 1859, s. 73.

Jackson, J.—IT is admitted that the decree made by the Judge in this suit cannot be supported in the form in which it stands. The plaintiffs brought this suit against Khajah Abdool Kureem, who, it seems, represents other parties than himself, to recover contribution of moneys paid by them in satisfaction of two decrees, under which they and the defendant were jointly liable. It appears that one of these two decrees was founded upon a deed called an ekrarnama, which purported to have been executed by various persons, all represented, as we understand, by parties now before the Court, and also by Fatima Bibee, who was by marriage a member of the same family. The suit brought upon this instrument proceeded to decree against all the defendants except Fatima, who was expressly exempted from liability, and it would seem that, for that reason in the present suit, no relief was sought as against Fatima. These matters coming to the notice of the Judge, not in the written statement of the defendant or otherwise, but at the time of argument of the suit, the Judge came to the conclusion that "the parties liable to "contribute evidently are Asadooddeen "Hyder, Abdool Kureem, Syud Mahomed, "Azizoonnissa, and Fatima." In making this statement the Judge appears to have assumed the liability of Fatima. Now it must be observed that the plaintiff had not made Fatima a defendant, and he had probably good reason for abstaining from so making her, considering what had already taken place in the previous suit. The Judge, however, considering that Fatima was one of the parties liable to contribute as regards the sum due under the ekrar, but that, being no party to the bond on which the other suit was founded, no liability attached to her in respect thereof, held that there had been two distinct causes of action against the parties, and that the suit, therefore, could not proceed, and ordered that the suit should be dismissed; but, as the objection, he says, "was only sprung at the eleventh hour," he makes no order for the defendants' costs. Now, it is manifest that the cause of action on which the plaintiff relied is one which was very simple and capable of the simplest possible proof, *viz.*, the joint liability of different parties under the decree of Court. For that the Judge has chosen, against the will and the prayer of the plaintiff, to substitute an entirely different cause of action, *viz.*, that arising from the different liabilities of the parties under the instrument called ekrar. It may be that the liability of Fatima could be made out in a suit framed for that purpose, and it may be that, in order to do justice

between all the parties, it would be right to bring in Fatima as a party to the suit, so far, at least, as the ekrar is concerned; but, under the circumstances, that can only be done on the application of the defendants who wish to be relieved of a portion of their liability by her being made liable to make her a party under section 73 of the Civil Procedure Code.

The judgment of the Court below dismissing the suit is set aside, and the case will go back to the District Court. That Court will be instructed to receive an application made by the defendants, if made within a reasonable time, say, within 14 days from the receipt of the record in the Court below, supported by proper affidavits to the effect that she subscribed to the ekrar, and benefited by the moneys borrowed thereunder; and if, on such application, the Judge think fit to make Fatima a party to the suit as regards the larger cause of action, he must try that separately, and also try separately the case arising out of the distinct cause of action against the other defendants exclusively. The defendants in their application must undertake to pay the costs of the defendant Fatima if her liability is not made out. It would be open to the parties to give fresh evidence as to the liability of Fatima. The costs of this appeal will abide the result.

The 8th December 1875.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Act VIII. (B. C.) of 1869, ss. 6 and 22—Right of Occupancy—Rent-free Holding.

Case No. 253 of 1875.

Special Appeal from a decision passed by the Officiating Judge of Sylhet, dated the 4th December 1874, reversing a decision of the Moonsiff of Lushkerpore, dated the 11th June 1874.

Kalee Krishna Deb (Plaintiff), *Appellant*,

versus

Shashonee Dassee (Defendant), *Respondent*.

Baboo Bharut Chunder Dutt for Appellant.

No one for Respondent.

A party who has been in the occupancy of land without paying any rent is not entitled to the protection of Act VIII. (B.C.) of 1869, s. 6 or of s. 22, even on the ground of a right to hold the land rent-free.

Garth, C.J.—We think that the Judge has made a mistake here. He has found as a fact that this kubooleut, which was granted by the plaintiff to the person under whom the defendant derives her title, is a valid instrument. That being so, the kubooleut created a tenancy-at-will of this homestead land at a rent of 1 rupee 8 annas. Now, according to the defendant's own story, she has not paid a farthing of this rent; and although it appears from the evidence that, instead of paying rent, her husband and she too, for a time, performed certain services for the plaintiff, she has now held the land for some time past without paying any rent, or rendering any equivalent in the shape of those services. Moreover she denies the validity of the kubooleut; she denies being a tenant; and she attempts to make out that her father-in-law, her husband, and herself have been holding, and have a right to hold, this land rent-free. Under these circumstances, the Judge has decided that the defendant is entitled to the protection of section 6 of Act VIII. of 1869 of the Bengal Council. Now let us see whether that is so. That section provides that "every ryot who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under a pottah or not, *so long as he pays the rent payable on account of the same.*" Now, here this defendant has never paid any rent, and, therefore, is not entitled to the protection of this section, or of section 22 to which the Judge has alluded. We think, therefore, that the Judge's decision must be reversed, and the judgment of the Moonsiff restored. The appellant will have the costs in this Court, but each party will bear his own costs in the Lower Appellate Court.

The 10th December 1875.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Pre-emption—Mokurruree Leases—Remand—Jurisdiction.

Case No. 234 of 1874.

Regular Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 27th June 1874.

Baboo Ram Golam Singh (Plaintiff), *Appellant,*

versus

Nursing Sahoy and others (Defendants), *Respondents.*

Baboo Aubinash Chunder Banerjee for Appellant.

Moonshee Mahomed Yusuf for Respondents.

Under the Mahomedan Law the right of pre-emption applies to sales only, and cannot be enforced with reference to leases in perpetuity like a mokurruree, which (however small the reserved rent) are not sales, and in which there is no "milkyut" or ownership on the part of the Shufee, or pre-emptor.

Where a plaintiff, in the first instance, brought his suit before a Moonsiff, and was referred by him to a higher Court, *viz.*, that of the Subordinate Judge from whose file the District Judge withdrew the case to try it himself, but, finding a portion of the claim untenable, referred the plaintiff to the Moonsiff's Court for the trial of the remainder: HELD that the Judge should have decided the remaining issues himself.

Kemp, J.—THE plaintiff is the appellant. He sued the defendants to recover possession by determination of right and for registration of his name in the milkyut and malgoozar's column of the Government record jointly with the name of Khookum Singh, the recorded proprietor, and others, in respect of 6 gundas 2 cowries 2 krants out of a divided puttee of one anna in Mouzah Bheempore, Pergunnah Mela, the towjee number of which in the Collectorate of Tirhoot is 4266, on the ground of a right of pre-emption as a partner in the property sold, dating his cause of action from the 27th of January 1874, the day of receiving intelligence of the sale and of the performance of the ceremonies of Tulub-i-mowasibut and Tulub-i-ishtehshad. In the plaint it is alleged that the defendant No. 2 has, without the plaintiff's knowledge, sold her mokurruree right, and the defendant No. 1, his milkyut or proprietary right to the same defendant, that is, the defendant No. 4, who is a stranger to the parties, under a deed of sale dated the 26th of January 1874; that immediately upon hearing of this sale, or on the 27th of January 1874, the information being given to the plaintiff by one Dhawur Singh, the plaintiff repeated thrice, "I have the right of pre-emption, I have purchased," and called upon the persons present in the assembly to become witnesses; that subsequently the plaintiff, accompanied by the aforesaid persons, took the sum of Rs. 1,295, the consideration inserted in the deed of conveyance, to the defendant, the vendor, again repeating his right of pre-emption, and calling upon the witnesses who accompanied him to become witnesses to this fact; and that he also went and tendered the sum of Rs. 1,295 to the vendee, who also refused to receive the money; that as the defendant No. 4 is a stranger and wholly unconcerned with the property, and as, by his becoming the malik, the plaintiff will be subjected to serious loss, he prays that a decree may be given in his favour, ordering possession of the property claimed on his depositing the proper and actual amount of consideration into the treasury of the Court. This suit was first instituted in the Court of the Moonsiff; but as the amount of consideration appeared to be Rs. 1,295 by the plaintiff's own showing, the Moonsiff held that he had no jurisdiction, the plaint was returned to the plaintiff, and the suit struck off the file. It was then entered in the register of the Subordinate Judge's Court and was called up by the Judge of the District to be heard in his Court as an original suit. The defendant, in his written statement, alleges that, under the deed of conveyance of the 26th January 1874, he has purchased the mokurruree and milkyut rights of two different persons; that, according to the law of pre-emption, no claim for pre-emption can be valid in respect of a mokurruree property, and, therefore, the claim of the plaintiff, with reference to the mokurruree property, must be dismissed; that the deed of conveyance, forming the basis of the claim of right to pre-emption, describes the consideration which passed in a definite way, namely, that Rs. 1,000 was paid as the value of the mokurruree property, and Rs. 295 as the value of the milkyut property; that as the claim to the mokurruree property is invalid under the Mahomedan Law, and the claim to the milkyut is in consideration of its valuation, namely, Rs. 295, cognizable by the Court of first instance, that is, the Moonsiff, it was not cognizable by the Judge.

The Additional Judge, Mr. Henderson,

after reciting the allegations of the plaint and the answers of the defendants according to their written statement, laid down the following issues: *1st*, whether the suit is multifarious; *2nd*, whether, with regard to the mokurruree, a claim for pre-emption is allowed by the Mahomedan Law, and, if it is not, whether the Court has jurisdiction. These issues are taken from the decision of the Additional Judge, and are given in his own words. The first issue was not argued before the Judge, and has not been argued before us. On the second issue, the Judge finds that the 6 gundas 2 cowries 2 krants mokurruree was originally granted by Nursingh to one Mussamut Beelakooer on the 17th of November 1871 at a jumma of Rs. 2 per annum; that, on the 26th January 1874, Beelakooer, along with Nursingh, sold under one deed of conveyance, she, her mokurruree right, and he, his proprietary right, to the defendant No. 4; that the question, therefore, was whether, with reference to this mokurruree, the claim to pre-emption was allowable by the Mahomedan Law. The Judge is of opinion that pre-emption does not apply, inasmuch as the mokurrureedar is not a malik, but merely a tenant at a fixed rate which cannot be enhanced; that the mokurrureedar does not stand in the same position as a malik, and the law of pre-emption only applies to the sales of land of a malik; that the mokurrureedar had every right to sell in respect of the law of pre-emption; that, under such circumstances, the claim for pre-emption set up by the plaintiff with regard to this mokurruree cannot be allowed; that, therefore, taking the value of the mokurruree as per deed of conveyance, namely, Rs. 1,000, the claim of the plaintiff, with reference to the milkyut or proprietary right, is reduced to Rs. 295, which makes the case triable by the Moonsiff, to whose Court, for the trial of the remainder of the claim, the Judge referred the party. The Judge concludes his decision by saying that it must be understood that he has treated the claim for pre-emption with reference to the mokurruree alone, and that he has not touched upon the issues of fact, as it was agreed that the issue in bar should be disposed of first, so that, if a final decision were arrived at on the issues in bar, the issues of fact need not be discussed at all.

On appeal the grounds taken are: *First*, that the learned Judge was wrong in holding that, under the Mahomedan Law, a claim to the mokurruree by right of pre-emption will not lie. The *second* ground is only a repetition of the first ground. It is to this effect—that the learned Judge is wrong in law in holding that the defendant had every right to sell the mokurruree irrespective of the law of pre-emption; *third*, that, even admitting for the sake of argument that the appellant's claim to the mokurruree was untenable, the learned Judge was clearly in error in dismissing the appellant's whole suit, on the ground that the remaining portion of the appellant's claim was triable by the Moonsiff; *fourth*, that the learned Judge ought to have taken evidence and tried the case on the merits.

In suits on a right of pre-emption, it has been held by many decisions of this Court that the plaintiff is bound strictly to prove his right. In this case the parties in the suit are both Hindoos. The law of pre-emption was, as observed by Mr. Justice Phear in Volume VIII., Weekly Reporter, page 31, "founded on the supposed necessities of a Mahomedan family arising out of the minute sub-division and inter-division of ancestral property." There can be no doubt, in my opinion, that the right of pre-emption is a creature of the Mahomedan Law, and it also appears to me that the exercise of the right is adverse to public interest, and tends to put a restraint upon the free purchase and sale of property; and I am certainly not disposed to recognize this right beyond the strict limits of the Mahomedan Law or beyond the decisions of this Court. Under the Mahomedan Law (see Chapter I., Volume III., Book 38, page 562 of Hedaya) the right of Shuffa, which means conjunction, appertains, *1st*, to a partner *in the property* of the land sold; *2nd*, to a partner in the immunities and appendages of the land, such as a right to water and to roads; and, *3rd*, to a neighbour. Now, the plaintiff comes into Court, claiming the right of pre-emption, on the ground that he is a partner in the property of the land sold. Can it be said that he is a partner in the mokurruree? And if the plaintiff, as a partner in the milkyut, can interfere in the sale of the mokurruree right by the mokurrureedar, on the ground that he is a partner in the property sold, it follows that the mokurrureedar can also interfere in the exercise of his rights by the proprietor in selling his proprietary rights; but this, the pleader for the appellant admits, the mokurrureedar cannot do. It has been held in a decision to be found in Volume VIII., Weekly Reporter, page 107, by Mr. Justice Macpherson, sitting with Mr. Justice Seton-Karr, that the opinion expressed by the Lower Appellate Court in that case, namely,

case of Moorulee Ram, plaintiff, *vs.* o Huree Ram and others, defendants, re-emption applies to sales only, and that ase in perpetuity, however small the ved rent, is not a sale, was a correct on; and therefore that the right of mption could not be enforced with ence to leases in perpetuity, such as urruree-leases.

his decision appears to us to dispose of whole case, that is to say, in so far as the urruree rights are concerned. We are er referred to page 473 of Baillie's st, in which it is laid down as the sixth ition that there must be "milkyut" or ership of the Shuffee or pre-emptor at the of the purchase. Now, in this case, it lear that the mokurruree was created, ving a rent on it of Rs. 2. This may small rent, and no doubt it is so; but we not to decide in this case whether this can be enhanced or not; it is sufficient s to say that, under the ruling already ed in Volume VIII., Weekly Reporter, 107, a lease in perpetuity like this urruree, however small the reserved , is not a sale, and that there is no lkyut" or ownership in this mokurruree the part of the plaintiff, the Shuffee or emptor. We therefore concur with the ge in his finding that the plaintiff is not tled to claim the right of pre-emption with rence to the mokurruree right. We come to the second question, namely, ther the Judge should have dismissed whole of the plaintiff's suit, and referred r trial to the Moonsiff. We think that much as the plaintiff did, in the first ance, bring his suit in the Court of the onsiff, and as he was referred by that Court higher Court, namely, that of the Subor- ate Judge, and as the Judge withdrew case from the file of the Subordinate ge to try it himself, that, simply because found a portion of the claim untenable, should not have put the plaintiff to the ense of a fresh suit, but should have cided upon the remaining issues which sed questions of fact; these issues being ether the plaintiff had performed the cessary ceremonies of Tulub-i-mowasi- and Tulub-i-ishteshad, and whether the intiff declined to purchase the disputed operty, and the defendant purchased it on declining to do so for a proper amount of nsideration and in good faith. Concurring, erefore, with the Judge in his finding as to mokurruree, we remand the case to him trial upon the remaining issues of fact, which involved the question of the right of the plaintiff to pre-emption over the *milkyut*. Costs to follow the result.

Pontifex, J.—With respect to the plaintiff's right of pre-emption over the mokurruree, I think this case is governed by the decision of Mr. Justice Macpherson in 8 Weekly Reporter, pages 106-107. For, if a mokurruree can be created against the will of a partner, it must carry with it the ordinary incidents of the tenure, including the unfettered right of alienation. I agree that the case must be remanded as directed by my learned colleague.

The 13th December 1875.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Caveat Emptor—Deed of Purchase—Eviction—Remedy.

Case No. 927 of 1875.

Special Appeal from a decision passed by the First Subordinate Judge of Mymensingh, dated the 9th February 1875, affirming a decision of the Moonsiff of Niklee, dated the 31st December 1873.

Gour Kishore Shaha (Plaintiff), *Appellant*,

versus

Chunder Kishore Dutt Mojoomdar (Defendant), *Respondent*.

Baboo Mohinee Mohun Roy for Appellant.

No one for Respondent.

By the rule of *caveat emptor*, the buyer is bound by law to take care of himself, and to see that he buys after satisfying himself that there is a good title.

The purchaser is bound to look, not only to his own title, but to see that he is properly indemnified by the covenants in his deed of purchase; and if he does not choose to protect himself in this manner, he has no remedy; for, if a deed of purchase has been once executed, unless there is an eviction by the vendor or some person claiming under him, the purchaser has no right of action against the vendor.

Garth, C.J.—This case has been very ably argued, but we see no reason for disturbing the judgment of the Court below. One of the points that has been raised before us is, that the Judge below was wrong in finding that, under the circumstances, the defendant was guilty of no fraud at the time when he effected his sale; in other words, that the Judge was wrong in this finding. I quote his words: "I am unable to perceive "that the defendant was fraudulently dis-"posed towards the plaintiff at the time of the "sale, which the plaintiff, as a neighbour, "concluded with a complete sense of its "advantages and disadvantages." This, as we understand it, is a distinct finding of fact that the defendant was guilty of no fraud at the time of effecting this sale, and we are asked to say that this finding is incorrect. But in special appeal it is impossible for us to reverse a finding arrived at by the lower Court upon a question of fact; we are not competent to do it; it is not within our jurisdiction. But, apart from that, looking at the circumstances of this case, we cannot see that it is inevitable, as it has been urged before us that it is, that, at the time of this sale, the defendant should have been guilty of a fraud. It might have been proved at the trial that the defendant had concealed the fact of his having this brother through whom the mother claimed title, and afterwards evicted the defendant from this property. It might have been proved distinctly that the defendant knowing that fact never divulged it, and that in point of fact the plaintiff did not know of it. But, so far from that having been done, it is evident, from the judgment which has been pronounced by the Subordinate Judge, that he believed that the plaintiff, being a neighbour and knowing all the circumstances of this property, was well aware of the defendant having a brother; and certain it is that in September 1872 he made a deposition in which he avowed his knowledge that the defendant had a brother who died 13 or 14 years ago. When he became possessed of this knowledge does not appear; but at any rate he was a neighbour; he had ample opportunities inquiring into the title of this prop himself, but he does not appear to h made any inquiries; he appears to h bought the property without taking a trouble about the matter. Under th circumstances the rule of *caveat emp* applies, and that rule means that the bu is bound by law to take care of himself; i is bound to see that what he buys he bu after satisfying himself that there is a go title. It is a very old maxim of law, and very good one, that, if people will not as themselves, the law will not assist them; if person chooses to buy a property witho looking into the title, he does so at his ow risk, and the law will not help him to g rid of his bargain.

But, apart from the question of fraud, is said that the defendant must have know that he was selling with a bad title. B I do not see that; he knew that he had brother, but he might have been ignora that through that brother his mother had title which would prevent his conveyin the property to the plaintiff. There nothing to show now that the defenda must have been guilty of a fraud when h effected this sale; certain it is that th Subordinate Judge has found that he wa guilty of *no fraud;* that he was not fraudu lently disposed in any way when he made this conveyance. We think therefore tha this objection fails.

Then it is said that, by the terms of th conveyance, there was a warranty of title, that is, that the defendant, when he con veyed this property, covenanted in a rude way, but substantially, for title, not only as against his own acts and the acts of his heirs, but as against all the world. We do not read the conveyance in that way. We read it to mean what an ordinary covenant means in an English conveyance—by which a man covenants that the buyer shall quietly enjoy the property, as against any acts of his own or of persons claiming under him, but not as against all the world.

The authorities are overwhelming to show that, if a deed of purchase has been once executed, unless there is an eviction by the defendant or some person claiming under him, there is no right of action against the defendant, and the purchaser is without remedy. The purchaser is bound to look, not only to his own title, but to see that he is properly indemnified by the covenants in

s deed; and if he does not choose to otect himself by ascertaining that he is ying with a good title, and by taking care at he is properly protected by proper venants, he has no remedy. This is not ly the doctrine of our Courts of law, but s been acted upon by Courts of Equity England for a long time past. It will be und laid down in Sugden's Vendors and rchasers, p. 548, where it is stated that, the conveyance has been actually executed y all the necessary parties, and the purchaser evicted by a title to which the covenants the conveyance do not extend, he cannot cover the purchase-money either at law or equity (see also Urmston *vs.* Pate, 3 Ves., 235). There is a late case reported in the oth Law Reports, Common Pleas, p. 334, which all the authorities on the subject ill be found collected. That was a case in hich some executors, believing that they ad a right to sell a property which belonged their testator, sold it to a purchaser, and eceived and spent the purchase-money. ome time afterwards, the heir-at-law set up title to this property, and recovered it from he purchaser who was thus deprived of verything that he had purchased. The urchaser then brought an action against the xecutors to recover the money which he had paid for the estate; but the Court held that he had no remedy.

That being the law in England, and there being no authority cited to show that the law is different in India, we consider that the same principle governs this case, and consequently there is no reason for disturbing the judgment of the Court below.

Considering the numberless sales that are constantly taking place in this country, and the numberless cases in which purchasers must have bought property to which they afterwards found that their vendors had no title, it is a remarkable circumstance that not one single instance or authority has been adduced in which, under circumstances like the present, an action has been brought against the vendor. I confess it has strongly impressed me with the opinion that the rule upon which we are acting is as firmly settled here as in England.

The appeal is dismissed, but without costs, as no one appears for the respondents.

Birch, J.—I concur.

The 16th December 1875.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act VIII. of 1859, s. 354—Remands—Appellate Court.

Case No. 349 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 12th December 1874, reversing a decision of the Second Moonsiff of Moonsheegunge, dated the 4th May 1874.

Bungo Chunder Banerjee and another (two of the Defendants), *Appellants,*

versus

Chunder Nath Chuckerbutty and others (Plaintiffs), *Respondents.*

Baboo Hurry Mohun Chuckerbutty for Appellants.

Baboo Bama Churn Banerjee for Respondents.

If the Appellate Court considers that any issue, not raised by the Court below, is material to the decision of the case, and finds that there is no evidence on the record sufficient for the determination of such issue, it is competent to direct a finding on that issue to be returned by the Court below; but not to remand the suit for re-trial.

Jackson, J.—The course taken by the Lower Appellate Court in this case is irregular and contrary to law. The Subordinate Judge was of opinion that proper issues had not been raised, and although it does not appear whether there was sufficient evidence upon the record or not, he set aside the judgment of the Moonsiff, and remanded the suit for re-trial. This is beyond the authority of the Lower Appellate Court to do. If the Subordinate Judge considered that any issue not raised by the Court below was material to be raised, and found that there was no evidence on the record sufficient for the determination of such issue, it was competent to him under section 354 to direct a finding on that issue to be returned by the Court below, the case being retained on his own file. The judgment of the Lower Appellate Court is set aside. That Court will take up the appeal *de novo*, ascertain what issues, if any, are necessary to be raised, and also ascertain whether there is evidence pertinent to those issues on the record or not. If necessity arises, an issue or issues may be sent down to the Court of first instance for a finding thereon, but the suit must not be remanded.

The 16th December 1875.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Vendor out of Possession—Purchaser's Right of Action.

Case No. 332 of 1875.

Special Appeal from a decision passed by the Officiating Additional Judge of Furreedpore, dated the 7th December 1874, reversing a decision of the Moonsiff of Muksoodpore, dated the 27th April 1874.

Aulock Monee Dossia (Plaintiff), *Appellant,*

versus

Aulock Monee Debia and others (Defendants), *Respondents.*

Baboo Grija Sunkur Mojoomdar for Appellant.

Baboo Nullit Chunder Sen for Respondents.

Where a vendor is out of possession at the time when the property is sold, the purchaser is entitled to commence a suit for the recovery of the property.

Jackson, J.—THIS suit has been disposed of by the Lower Appellate Court in an extremely learned judgment in which the plaintiff is put out of Court upon the simple ground that her vendor being out of possession at the time when the property was sold, there was nothing to go to the plaintiff. That is a proposition which we think cannot be supported in that form, and we consider that the result of the cases in this Court upon that point does not warrant so broad and general a proposition of law as that laid down by the Judge. We may refer to a case decided by three Judges of this Court, reported at page 81, Volume XI., Weekly Reporter, in which judgment was given by the late learned Chief Justice, Sir Barnes Peacock, and in which it is pointed out that, in such a case, a purchaser is entitled, under his purchase, to commence a suit for the recovery of a property to which the right has been transferred to him. There are other questions on which the determination of this suit depends which have not been determined by the Lower Appellate Court. That judgment must therefore be set aside, and the suit remanded in order that those points may be inquired into. The costs of this appeal will abide the result.

The 17th December 1875.

Present :

The Hon'ble F. B. Kemp and E. G. Bir[illegible] *Judges.*

Review of Co-ordinate Court's Judgment.

Case No. 816 of 1875.

Special Appeal from a decision passed by [illegible] Officiating Subordinate Judge of Tipper[illegible] dated the 29th January 1875, affirming [illegible] decision of the Moonsiff of Nasirnugg[illegible] dated the 12th September 1873.

Wolfut and another (two of the Defendant[illegible] *Appellants,*

versus

Nusrutoollah (Plaintiff), *Respondent.*

Baboo Protap Chunder Mojoomdar for Appellants.

Baboo Umbika Churn Banerjee for Respondent.

One judicial officer cannot review the judgment of an other of the same grade, simply on the ground of the latter not having taken a right view of the evidence.

Kemp, J.—THE first ground taken in special appeal is that the Court of appeal was in error in admitting a review of judgment, and reversing the judgment of his predecessor on the self-same evidence, and that, in fact, the Subordinate Judge exercised the functions of an Appellate Court.

The plaintiff sued to obtain possession of a 2-anna and 11-gundas' share in certain properties detailed in the plaint, which he alleged had been left by his father Alimoolla, and that, according to Mahomedan Law, he was entitled to the share claimed.

The Moonsiff decreed the plaintiff's claim, and awarded possession of the 2-anna and 11-gundas' share in all the lands claimed.

On appeal the Subordinate Judge of Tipperah, Baboo Nobinchunder Ghose, on the 30th of September 1874, modified the decision of the Moonsiff, and awarded possession to the plaintiff of 2 annas 11

das out of an integral 2 annas 6 gundas owries and 2 krants share, being the one-h share of Alimoolla, the plaintiff's er, in the lands numbered 2 and 7 to 15. On the 29th of December 1874, when one remained of 90 days within which an lication for review could be admitted, the intiff applied, not to Baboo Nobinchunder ose, but to his successor, Baboo Jadub-nder Dey, who was officiating for him, grant a review of his predecessor's judg-nt, and the ground which he took was that oo Nobinchunder Ghose had not properly sidered the evidence; that he had in determined the case contrary to the ght of evidence. No new evidence was nced, and no other grounds were stated n those mentioned above.

Upon this, the present Subordinate Judge, oo Jadubchunder Dey, ordered that the e be restored to the file, and that it be tried its merits on the same day that the peti-n of review was filed. Subsequently, wever, it appears that the decision in review not passed till the 29th of January 75. He reversed the decision of his decessor, and confirmed the decision of Moonsiff.

Several cases have been cited by the ader for the special appellant, the latest of ich will be found in 23 Weekly porter, p. 438, and 24 Weekly Report-, p. 387. The decision in 24 Weekly porter is by the present Chief Justice, and refers to the one in 23 Weekly Report-, by the late Officiating Chief Justice, Mr. stice Macpherson, and Mr. Justice Birch. may also mention that Mr. Justice Birch k part in the decision in 24 Weekly porter. The late Officiating Chief Justice, r. Justice Macpherson, observes that, if a bordinate Judge is allowed to review the cision of his predecessor, not on any new idence, but simply because it is stated fore him that his predecessor has deter-ned the case contrary to the weight of idence, a suit may go on for ever. On the urn of Baboo Nobinchunder Ghose, there nothing to prevent him from reviewing ain the order of Baboo Jadubchunder ey. It was never intended by the Legis-ture that one officer of the same grade ould review the judgment of another ficer, not upon any new evidence or for any ror patent in the decision of his predecessor, t simply because it is stated that his edecessor has not taken a right view of e evidence. Following the rulings which ve been quoted, we reverse the decision of Baboo Jadubchunder Dey, and restore the decision of Baboo Nobinchunder Ghose dated the 30th of September 1874, with costs payable by the respondent.

The 17th December 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Partnership—Agreement—Contract Act of 1872, s. 253, cl. 10.

Case No. 388 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of the 24-Pergunnahs, dated the 7th December 1874, reversing a decision of the Third Moonsiff of Alipore, dated the 27th March 1874.

Shaikh Peer Mahomed (Defendant), *Appellant,*

versus

Nekjan Bibee and others (Plaintiffs), *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Ashootosh Dhur for Respondents.

Where one party (A) advanced money to others to carry on business, and an instrument was executed whereby the latter agreed and bound themselves to account yearly to the former for a share of the profits, the transaction was HELD to amount to an agreement that A should be a party to the business *pro tanto:*

HELD that, by the operation of the Contract Act of 1872, s. 253, cl. 10, the partnership between A and the others was dissolved by the death of A, and that the representatives of A, by receiving, some six months after his death, an account with a portion of the money advanced and of the profits, did not re-constitute partnership, but rather indicated an opposite intention.

Jackson, J.—IT appears to us that the judgment of the Lower Appellate Court in this case is not correct. The plaintiffs sued as the representatives of one Roushun who in 1268 advanced a sum of money to the defendant Peer Mahomed and another, and for which an instrument was executed at

that time between those parties whereby the latter agreed and bound themselves to account yearly to the former for a fourth share of the profits arising from the business they were carrying on. That appears to us to amount to an agreement between the parties that Roushun should be a party to the business to that extent. Accounts appear to have been yearly adjusted thereafter, and Roushun died in 1276. After that it seems in Bhadro 1277 the representatives of Roushun received from Peer Mahomed and his partner an account of the capital and the profits, and that on that account Rs. 85 out of the capital sum advanced was repaid, and Rs. 75 received in the shape of profits. By the plaint now, it is sought to recover from the defendant the profits of the business in question for the years 1277 and 1278, and it is said that the plaintiffs are entitled out of the same to Rs. 350 as for the aforesaid 4-annas share. This suit was dismissed by the Moonsiff of Alipore on the ground of limitation for having been brought more than three years after the death of Roushun. It is clear that by the operation of section 253, clause 10, of the Contract Act of 1872, the partnership, if it was a partnership, between Roushun and Peer Mahomed, was dissolved in Pous 1276 by the death of Roushun. But the Subordinate Judge considers that, by what took place in Bhadro 1277, the plaintiffs were recognized as partners. We have asked Baboo Ashootosh Dhur, who appears for the respondents in this case, to refer us to any authority showing that the plaintiffs by receiving, some six months after the death of Roushun, an account and about two-thirds of the money advanced together with the money due in the way of profits, made themselves partners with the defendant. We are not referred to any such authority, and it appears to us that the Subordinate Judge was not justified in inferring from the circumstances that the plaintiffs and the defendant became partners. On the contrary, it appears to us rather that the repayment of Rs. 85 out of Rs. 131, which was originally the advance made by Roushun, negatived any intention on the part of Roushun's representatives to continue or re-constitute the partnership. That being so, and more than three years since the death of Roushun having elapsed, and there being no acknowledgment or promise in writing as provided by section 20 of the Limitation Act, we think that this suit is barred by limitation. We reverse the judgment of the Lower Appellate Court, and restore that of the Moonsiff with costs.

The 17th December 1875.

Present:

The Hon'ble Louis S. Jackson and W. McDonell, *Judges.*

Special Appeal—High Court's Jurisdiction

Case No. 432 of 1875.

Special Appeal from a decision passed the Judge of Dacca, dated the December 1874, reversing a decision the Subordinate Judge of that Distr dated the 23rd March 1874.

Anund Chunder Chuckerbutty and oth (Defendants), *Appellants,*

versus

Rutnessur Doss Sen and another (Plaint *Respondents.*

Baboos Mohinee Mohun Roy and *Ras Beharee Ghose* for Appellants.

Mr. A. M. Bose and *Baboo Kalee Mo Doss* for Respondents.

The High Court HELD itself to be competent special appeal, to reverse a decision of the L Appellate Court which set aside a judgment of Court of first instance, dismissing a suit where defe ants had a positive unrebutted case against w plaintiffs had adduced nothing.

Jackson, J.—THE two questions whi have been argued in this special appeal a *firstly*, whether it has been rightly held the Lower Appellate Court that Kal Kishore, at the time when he consented the sale by his mother, Moni Kurnica, w not of age; and, *secondly*, whether, supposi Kalee Kishore to have been of age, his co sent would ratify and validate the transa tion. Upon the first question, which matt would appear at first sight to be a me question of fact, we are clearly of opini that the decision of the Court below is er neous, and that the error is such as that w are competent to set it aside in special appe The Judge begins by saying: "Th "plaintiffs now sue to set aside that sale o "the ground, *first*, that Kalee Kishore w "then not of full age, and consequently th "he could not legally consent to the sal "*second*, that the sale was made without a "legal necessity." Now, the plaintiffs ha not sued on any such ground. If they ha so sued, it would have been open to th defendants, in the *first* place, to plead th they were not at liberty to make any suc allegation; and, *secondly*, to adduce clear an

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sitive evidence as to the age of Kalee Kishore at the time of the transaction. But ere was no such allegation in the plaint, r was there anything in the issues framed the Court below which would have led e defendants to adduce evidence upon that int. It appears that, while the witnesses ere being examined in regard to the transtions which were in question, they were ked what the age of Kalee Kishore was, d they answered that he was about 15 or years of age. There was no evidence this point adduced by the plaintiffs; but, the other hand, the defendants had filed e plaintiff's own written statement which described by the Judge as statement in a etition. It was a written statement verified y them in a suit in which they were parties, nd in that written statement they distinctly firmed that Kalee Kishore did the act poken of being of full age. In addition to hat, it is shown that Kalee Kishore had, revious to that act, been a plaintiff in anther suit, jointly with his mother no doubt, ut still acting as a plaintiff *sui juris*, and hat such action of his had been unchallenged y the parties to whom he was opposed and nquestioned by the Court. These circumtances, together with the fair presumption rising from Kalee Kishore's executing this deed confirming his mother's alienation, and coupled with the solemn written statement of the plaintiffs themselves, could not, it ppears to us, be displaced except by positive proof on the part of the plaintiffs as to the precise age of Kalee Kishore. They gave no such evidence; but they profited by a loose, careless guess of the witnesses who said that he was at a certain time about 15 or 16 years of age. It appears to us, therefore, that on this part of the case the defendants had a positive unrebutted case against which the plaintiffs had adduced nothing whatever, and in that state of the evidence it appears to us that the District Judge was not justified in setting aside the judgment of the Court below; but that the Court below decided rightly and its judgment ought to be affirmed on that point, and that of the Lower Appellate Court reversed. The next question is, whether, supposing Kalee Kishore to have been of age, he could sufficiently ratify the act of the mother. We have been referred to a case in 3 B. L. Reports, page 357,* in which the Judicial Committee of the Privy Council laid down that, in the class of cases there referred to, the act of a Hindoo widow in possession of an estate must be confirmed by all the reversioners, that is to say, by all the persons likely to be interested in disputing the act in question. But this is not the case of a Hindoo widow, but that of a daughter; and the person confirming her act was clearly the only person at that time interested or likely to be interested in disputing her act. He was the next heir. It appears to us, therefore, that, as far as the question of ratification is concerned, the act of Moni Kurnica was amply ratified. Then something has been said of the circumstances of the transfer. It is said that the interests of the reversioners have not been properly considered. We are entirely at a loss to understand how any argument could be based, or how any judgment of the Lower Appellate Court could be founded upon the circumstances of a transaction which took place thirty years before, in which most of the parties concerned must be long out of the way, and of which greater part of the circumstances must have been entirely forgotten. That, however, is immaterial for the present. We think the judgment of the Court of first instance in this case is right and must be affirmed, and the judgment of the Lower Appellate Court set aside with costs.

* 12 W. R., p. 291.

The 21st December 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Mortgage-deed—Prior Lien—Right of Suit.

Case No. 108 of 1875.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 5th January 1874, affirming a decision of the Subordinate Judge of that District, dated the 15th December 1873.

Radha Churn Shaha (Plaintiff), *Appellant,*

versus

Parbuttee Churn Dutt (Defendant), *Respondent.*

Baboo Jadub Chunder Seal for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

Where money is lent on a mortgage-deed, on the condition that, if returned with interest within a given period, the property pledged shall revert to the mortgagor, and the mortgagee finds afterwards that the property in question is subject to a prior mortgage as to which he was not informed, and that he is, therefore, without the supposed security, he is at liberty to sue for the return of the money advanced with interest without waiting for the expiry of the stipulated period.

Kemp, J.—This is a suit to recover a sum of Rs. 1,451-1-4. The plaintiff alleges that the defendant took a loan from him of Rs. 1,200 bearing interest at Rs. 1-4 per cent. per mensem on a conditional deed of sale, the execution of which is admitted by the defendant. The terms of that deed are, that, if within ten years from the 26th of Bhadro 1276, the date of the deed, the defendant should pay Rs. 1,200, the principal advanced to him, with interest as stated above, the property pledged, the possession of which, it is alleged by the plaintiff, was not made over to him, would revert to the defendant.

The plaintiff also alleges that, prior to this transaction between him and the defendant, the property mentioned in the deed of conditional sale had been pledged to one Lukhi Prasad Tewary; that the defendant concealed this fact from him; and that he, having thus been deprived of the security for his money by the fraudulent act of the defendant, is entitled to bring this suit, which he accordingly does, claiming, as we have already stated, Rs. 1,451-1-4.

The defendant in his written statement pleaded that, as the term of the plaintiff's kutkobala had not expired, his suit was premature; that the allegation in this plaint that he had concealed the fact of the previous mortgage to Lukhi Prasad Tewary is false; and that the plaintiff accepted the property as security with the full knowledge that it had been mortgaged to the said Tewary.

The Subordinate Judge raised two issues: *First*, whether the plaintiff is competent to bring this suit before the expiration of the time of mortgage; and, *secondly*, has the plaintiff purchased the decree in execution of which the mortgaged property was sold, and is it true that he has enjoyed possession of the same; but, without entering into merits, he dismissed the suit under sec 170 of Act VIII. of 1859, because plaintiff would not appear and give evid although he was cited for that purpose the defendant.

On appeal the Judge of Tipperah that the summons served on the plaintiff not sufficient in law, and that therefo section 170 did not apply; and as all the dence was on the record, he considere unnecessary to remand the case, but proceed to dispose of it himself. After reciting statements of the parties to the suit, he s that he thinks that his judgment had be confined to the question whether th was any fraud or deception on the part the defendant in his dealings with plaintiff; and the Judge is of opinion th if the plaintiff cannot show this, he can succeed in the present suit for the recov of the money before the expiry of the years, and that, at the end of that time, question might be raised and determined a suit to be brought by the plaintiff as whether it should be one for restoration the money or for foreclosure only.

We think that there has not been a prop finding upon the allegations of the part to the suit. The plaintiff's suit is a ve simple one. He alleges that he advanc money to the defendant, a fact which is denied by the defendant; he further alleg that security was given by the defendant, fact which the defendant admits; but th plaintiff further alleges that that security longer exists owing to the fraudulent condu of the defendant in having withheld infor mation from him of the prior mortgage this property to another person, namely Lukhi Prasad Tewary. There is nothing the terms of the conditional deed of sal which restricts the plaintiff from bringing his action in its present shape until th expiry of ten years. We think that th case must go back, and that there must be proper finding by the Judge as to whethe the plaintiff, as he alleges, has been deprived of the security which he had for the pay ment of his debt by the conduct of th defendant, or whether, as alleged by th defendant, the plaintiff was aware of th previous mortgage by the defendant to Lukhi Prasad Tewary. Costs will follow th result.

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The 21st December 1875.

Present:

e Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

ry—Right to a Ferry-ghaut—Change of starting-point.

Case No. 939 of 1875.

ecial Appeal from a decision passed by he Subordinate Judge of Rajshahye, lated the 4th February 1875, reversing decision of the Moonsiff of Pubna, lated the 31st July 1873.

M. Gordon and another (two of the Defendants), *Appellants,*

versus

Sopee Soonduree Dossee, guardian of Oopendro Narain Singh, minor (Plaintiff), and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Rajendro Nath Bose for Respondents.

The right to a ferry-ghaut cannot follow the starting-point of the ferry wherever it may be carried by a hange in the course of the river, unless the new position s within the possessor's own land.

Kemp, J.—THE Subordinate Judge lays down two issues: *First*, whether the ferry-ghaut exists within the line mentioned in the plaint. On the plaintiff's own showing, the ferry-ghaut does not exist as it existed originally. The *second* issue is, whether the plaintiff has a right to the possession of the ferry-ghaut, if, by a change in the course of the river, it has been removed from its former position to the land of the defendant No. 3.

In the first instance the case was thrown out by the Subordinate Judge, as he was of opinion that he had no jurisdiction; but this Court directed him to try the case.

The Moonsiff found against the plaintiff; the pith of his decision is at page 9 of the printed-book, and is to the following effect: "Now the question is, whether the plaintiff "can still have the ferry when it no longer "exists below Gungadhur De, and has been "removed to a point which lies in khas chur "Dhokra Kali. Of course, if she could "prove that the limits of Gungadhur De "extended between the points described by "her, that would have been enough. She "has failed to do so. She cannot claim any "right to go over the defendant's land, and "use it for her ferry." He therefore dismissed the plaintiff's suit.

The Subordinate Judge found, on the contrary, that although it is clear, and not disputed by the pleader for the special respondent, that the former line of ferry no longer exists, and that the land from which the ferry starts has been held by the defendant for several years before the institution of the suit, yet that the plaintiff is entitled.

In special appeal it is contended that although the intervention of the chur between the former starting point and the former landing point of the ferry removed the original line of the ferry, still the plaintiff was entitled to follow the starting point of the ferry wherever it may exist, although that point may be on the defendant's land. No authority for this proposition has been adduced by the pleader. A case has been referred to in 2 Weekly Reporter, p. 286, but that case has nothing to do with the present case. In that case the suit was remanded, because the special appellant pleaded a specific deed of agreement under which the right of ferry was made over to him, and the Principal Sudder Ameen had not come to any decision upon that point.

The decision of the Subordinate Judge is reversed with costs.

The 22nd December 1875.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Possession by Co-sharer—Adverse Possession.

Case No. 2057 of 1874.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 30th April 1874, reversing a decision of the Moonsiff of Toobkibograh, dated the 31st May 1873.

Shurfunnissa Bibee Chowdhrain (Plaintiff), *Appellant,*

versus

Kylash Chunder Gungopadhya and others (Defendants), *Respondents.*

Baboos Taruck Nath Paleet and *Hem Chunder Banerjee* for Appellant.

Baboo Nullit Chunder Sen for Respondents.

Possession of a plot of land does not constitute adverse possession in relation to a co-sharer, unless the latter claims or asserts some right in the land which is denied by the sharer in possession.

Macpherson, J.—IT appears to us that the Judge was wrong in reversing the Moonsiff's

decree on the ground that the plaintiff's suit is barred by limitation. The Judge does not find that, for more than twelve years before the suit was instituted, the defendants, or any persons through whom they claim, had possession adverse to the plaintiff; and unless there was such possession adverse to the plaintiff for more than twelve years, the suit is not barred.

The Judge finds that the plaintiff and defendants are co-sharers in the property in question. That being so, the mere fact that one co-sharer was in possession of a certain plot of this land, and the plaintiff not in actual possession of any part of it, would not constitute adverse possession. The possession would not be adverse until the plaintiff claimed or asserted some right in the land held by her co-sharer, and that right was denied by him. Here nothing of the kind is found by the Judge, and, therefore, there is nothing to show that the suit is barred by limitation.

We reverse the decision of the Judge, and confirm that of the Moonsiff with this modification that we declare the plaintiff entitled to possession of her share in the land indicated by the Judge in his judgment as an accretion to Imambux, but not to any portion of the land which has accreted to Joogul Kishore, or Mirza Jan. She is simply entitled to her share of the accretion to Imambux as found by the Judge.

The appellant is entitled to her costs, both in this Court and in the Courts below.

The 22nd December 1875.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Thakbust—Evidence.

Case No. 1509 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 1st April 1874, reversing a decision of the Moonsiff of Russoolgunge, dated the 5th January 1874.

Shaikh Charoo and others (Plaintiffs), *Appellants,*

versus

Mussamut Zobeida Khatoon and others (Defendants), *Respondents.*

Baboos Grish Chunder Ghose and *Joy Gobind Shome* for Appellants.

Moonshee Serajul Islam for Respondents.

A suit was remanded for re-trial, because the thakbust and certain proceedings as to it taken by defendants had not been regarded as evidence.

Macpherson, J.—The judgment of the Lower Appellate Court must be reversed and the case must be remanded to that Court to be re-tried.

The Subordinate Judge is entirely wrong in saying that the thakbust and the subsequent proceedings as to it (when the defendants brought a suit for confirmation of possession, and to have the thakbust set aside—which suit was dismissed) are not evidence against the defendants. They are very strong evidence against them; and the whole case must be reconsidered with reference to the fact that they are so. We think the mistake is so important and of so radical a character that the plaintiff is entitled to have the suit remanded in order that it may be properly tried. Costs will abide the result.

The 22nd December 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Suit by Mahomedan Wives—Onus Probandi—Mohorana or Dower-money.

Special Appeal from a decision passed by the Deputy Commissioner of Goalparah, dated the 24th November 1874, affirming a decision of the Extra Assistant Commissioner of that District, dated the 11th June 1874.

Roop Chand Aswal (Defendant), *Appellant,*

versus

Mussamut Karfool and another (Plaintiffs) and others (Defendants), *Respondents.*

Baboo Roop Nath Banerjee for Appellant.

Baboo Gopal Lall Mitter for Respondents.

Where two Mahomedan women sued for confirmation of their right to certain properties, alleging that they had purchased them with their own funds, and defendant No. 1 pleaded that plaintiffs were the wives of

nts Nos. 2 and 3, who had, for the purpose of payment of debts, purchased the properties in es of their wives, the suit was dismissed, because s failed to prove that they had purchased with exclusively belonging to them over which their s had no control.

p, J.—THE defendant No. 1 is the l appellant in this case. The plaintiffs or confirmation of their right to the rties in suit, alleging that they pur- d them with their own funds.

e defendant No. 1 states that the plaint- re the wives of defendants Nos. 2 and t the defendants Nos. 2 and 3 are deeply bt; that, for the purpose of evading pay- of those debts, they purchased these rties in the names of their wives; and their husbands are in possession of the property and that the plaintiffs have ght whatever.

e first Court raised the following issues: , whether the property was bought the plaintiffs' *mohorana* or dower- y; and, *secondly*, whether it is liable to old for the satisfaction of the decree st the plaintiffs' husbands. Then the ng on these issues is, that a Mussulman has, under Mahomedan Law, full right to dower received by her, and it is proved the witnesses for the plaintiffs that the ds, &c., were purchased for them by Ooda ia, the father of the plaintiff, Karfool, Rs. 177 out of Rs. 205 kept with him, therefore it may fairly be presumed that money with which the property was chased belonged to the plaintiffs. The was, therefore, decreed, and it was lared that the property in dispute was not ble to be sold in satisfaction of the decree inst defendants Nos. 2 and 3.

The Deputy Commissioner and Subor- ate Judge of Goalparah has confirmed s decision. He says it does not much tter who were in possession of this pro- rty if it could be shown that the pur- ase was effected with money over which e plaintiffs had exclusive right independent their husbands. He then says he has refully perused the evidence on the record, nd thinks there can be no doubt that Ooda ania purchased the disputed property with e money which was lodged with him by e plaintiffs as *mohorana* or dower-money.

In special appeal it is contended that the Court below was wrong in this finding, that Ooda Bania does not depose that the property as purchased with *mohorana*-money or y money over which the plaintiffs had xclusive right independent of their hus- bands.

On turning to the evidence of Ooda Bania we find that this contention is true. Ooda Bania was not cross-examined by the plaintiffs, and it appears from the order of the 6th of April 1874 that the plaintiffs would not produce any other witness with the exception of Ooda Bania. We therefore hold that the plaintiffs having failed to prove their case, which was that these properties were purchased by them with moneys exclusively belonging to them, and over which their husbands had no control, we decree the appeal, and reverse the decision of the Courts below with costs.

The 4th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Joint Decree—Act VIII. (B.C.) of 1869, s. 58.

Case No. 214 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Purneah, dated the 14th May 1875, reversing an order of the Officiating Sudder Moonsiff of that District, dated the 11th January 1875.

Mirza Syefoollah Khan (Judgment-debtor), *Appellant,*

versus

Mr. A. J. Forbes (Decree-holder), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Mr. C. Gregory for Respondent.

A joint decree against two defendants for a sum exceeding Rs. 500 cannot be divided so as to fall within the scope of Act VIII. (B. C.) of 1869, s. 58.

Glover, J.—THE appeal must be dismissed with costs. The decree was a joint one and for a sum exceeding Rs. 500 calculating interest, and it can in no way be separated so as to say that one part is due from the present petitioner, and the other part from the other defendant. Section 58, Act VIII. (B. C.) of 1869, does not apply to this case, as the decree was one for above Rs. 500. The Judge's order is therefore correct. The appeal is dismissed with costs.

The 6th January 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Ejectment—Tenant's Rights—Onus Probandi.

Case No. 2687 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Manbhoom, dated the 31st July 1874, reversing a decision of the Extra Assistant Commissioner of that District, dated the 24th June 1873.

Narain Mundul (one of the Defendants), *Appellant*,

versus

Bhookto Mahato (Plaintiff), *Respondent*.

Baboo Nil Madhub Sen for Appellant.

Baboo Biprodass Mookerjee for Respondent.

A suit for ejectment by a landlord cannot succeed against a defendant who is admitted to have held the land as the plaintiff's tenant, unless it is proved that the tenancy has in some way ceased to exist, either by expiry of the term of the lease or by service of notice.

Garth, C.J.—We think that the Lower Appellate Court has made a mistake here. The plaintiff's case was, that the defendant was his tenant; that he had held under a lease; and that the term of that lease had expired.

The defendant put his case in a different way. He tried to make out in his written statement that his interest was a larger one than the facts warranted. But, whatever the defendant's contention was, or the evidence which he adduced, it was for the plaintiff to make out that he had a right to turn the defendant out of possession. It being admitted that the defendant held the land as the plaintiff's tenant, the plaintiff was bound to show that his tenancy had in some way ceased to exist. He might have done this by proving that a pottah had been given for a term of years, and that the term had expired; or by showing that the defendant was a tenant who might be turned out by notice, that notice had been given, and that the notice had expired; but he was bound in some way or other to show that the right to retain possession of the land had ceased; and this he has not done. The Subordinate Judge has found as a fact that the tenancy existed, and that the defendant was r the plaintiff's tenant; and having fo this, he strangely enough comes to the c clusion that the plaintiff is entitled to cover as against the defendant. We th that he has made a mistake. A tena having been proved by the defendant, and a certain extent admitted by the plain and the plaintiff having failed to prove th it had ceased, the Subordinate Judge w wrong in deciding that the plaintiff w entitled to recover.

We accordingly reverse the decision the Subordinate Judge, and affirm so m of the decision of the Moonsiff as dismi the plaintiff's suit with costs. The r spondent will pay the costs of this Co and also of the Lower Appellate Court.

The 6th January 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Ch Justice*, and the Hon'ble E. G. Bir *Judge*.

Suit against Tenant—Limitation.

Case No. 2196 of 1874.

Special Appeal from a decision passed the Judge of West Burdwan, dated t 8th August 1874, reversing a decision the Moonsiff of Bancoorah, dated th 18th September 1873.

Haradhun Roy (Plaintiff), *Appellant*,

versus

Hulodhur Chunder Chowdhry and others (Defendants), *Respondents*.

Baboo Nil Madhub Bose for Appellant.

Baboo Rash Beharee Ghose for Respondents.

A tenant cannot set up the Statute of Limitation as a bar to any suit which his landlord may bring against him.

Garth, C.J.—We think that in this case the Lower Appellate Court was wrong in deciding the point of limitation against the plaintiff. There seems to be no doubt, either upon authority or principle, that, if the relation of landlord and tenant is established within the twelve years, the tenant cannot set up the Statute of Limitation as a bar to any suit which his landlord may bring against him.

Now, in this case, it is proved that, on the 12th of January 1862 (which was within

years from the time when the suit mmenced), there was a decree by a of competent jurisdiction between arties, which established their relative determining that the plaintiff in the suit was the proprietor of the land, t the defendant in that suit (who is cestor of the present defendant, and whom the present defendant confess- erives his title and derives his rights) e plaintiff's tenant at a certain rent. ation, therefore, of landlord and tenant been thus established between these by a competent tribunal, the posses- the tenant became the possession of ndlord for all purposes of limitation, does not lie in the mouth of the to ignore his landlord's title or set up oint of limitation against him. We er, therefore, that the plaintiff's right ver is not barred.

having decided this point, we are still a position finally to dispose of the because the Judge has only decided reliminary point, and has stated that s not think it necessary to go into the on of title. We think, therefore, that case must go back to him in order that hould decide that question.

his order has reference only to plots 2 3 The appeal as to plot 1 will be dis- ed, each party paying his own costs in Court.

The 6th January 1876.

Present:

e Hon'ble Sir Richard Garth, *Kt., Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Decree—Third Parties.

Case No. 1379 of 1874.

ecial Appeal from a decision passed by the Judge of Bhaugulpore, dated the 27th March 1874, reversing a decision of the First Subordinate Judge of that District, dated the 13th August 1872.

Lalla Mohadeo Dyal Singh (Plaintiff), *Appellant,*

versus

hundee Pershad and others (Defendants), *Respondents.*

Baboo Doorgadoss Dutt for Appellant.

Mr. M. L. Sandel for Respondents.

A decree cannot affect a third party who was no party to the suit in which it was made.

Garth, C. J.—In this case it is sufficient to say that the plaintiffs have failed to satisfy us that the Judge has made a mistake. That passage in his judgment to which the appellants' pleader drew our attention clearly referred to some transactions with the property which took place a long time ago. The point which the Judge had to decide was with regard to the plaintiffs' possession, and he has found upon the evidence that they have not had possession for twelve years previous to the institution of the suit; and that consequently their claim is barred by limitation.

With regard to the decree to which our attention has been called, that appears to have been obtained in a suit between the plaintiffs and their vendor, a third party, and consequently neither that decree nor the change of names which took place in consequence of it can affect a third person who was no party to the suit in which it was made. Besides which, the Judge has found, as a matter of fact, that it was a fraudulent decree, collusively come to between the plaintiffs and their vendor, for the purpose of propping up a bad case. But even supposing that the Judge had not found that it was a fraudulent decree, it would not, properly speaking, be evidence against the defendants in this suit.

Under these circumstances, we cannot say that the Judge was wrong in finding that the plaintiffs had failed to show that they had been in possession within the last twelve years. The appeal will be dismissed with costs.

The 10th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Rent-decree—Error—Ejectment.

Case No. 243 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 18th May 1875, affirming an order of the Moonsiff of that District, dated the 18th December 1874.

Runnoo Roy and another (Judgment-debtors), *Appellants,*

versus

Kadoo Lall (Decree-holder), *Respondent.*

Moulvie Serajul Islam for Appellants.

Mr. R. E. Twidale and *Moulvie Murhumut Hossein* for Respondent.

Where a judgment-debtor complied with the terms of a rent-decree, as he found them in the certified copy issued to him, he was held to be protected from ejectment, even though the amount paid (owing to an error in the copy) was less than the amount really due.

Mitter, J.—We do not think that in this case the decision of the lower Court is correct.

The plaintiff, the special respondent before us, sued the appellant for arrears of rent, and obtained a decree in terms of section 52. The appellant, who was the defendant in that case, got a copy of the decree passed against him, in which it was inserted that he was liable only for Rs. 223. He paid this amount within fifteen days from the date of the decree. It appeared subsequently that there was an error in this copy, and that the decree was really for a larger amount. The decree-holder then executed the decree for the balance, and had a warrant of arrest issued against the debtor. Upon which the money was deposited in Court forthwith.

The decree-holder now seeks to eject the tenant in pursuance of his decree, on the ground that, although the Rs. 223 inserted in the copy of the decree furnished to the special appellant was paid within fifteen days, the whole amount which was really due under the decree not having been paid within the time allowed, he is entitled to eject the defendant.

The lower Courts have held that the decree-holder is entitled to this relief.

We do not think that the decision of the lower Courts is correct. The judgment-debtor, who is the special appellant before us, complied with the terms of the decree as he found them in the certified copy which was issued to him; and if there was an error in it, he ought not to suffer for it. It has been said that he did not deposit the right amount intentionally, and that he took advantage of the error which was found in the copy, and for that reason did not deposit the correct amount. We do not think that the lower Courts have come to that conclusion, and it is not probable that that was the case. We, therefore, simply upon the ground that the judgment-debtor complied with the terms of the decree as he found them in the certified copy issued to him, think that there was sufficient compliance with the terms of the decree by the ju[illegible]ment-debtor within the time allowed [illegible] law; and upon that ground we think [illegible] the decree-holder is not entitled to exec[illegible] the decree for ejectment in this case. [illegible] therefore set aside the order of the lo[illegible] Courts, and decree this special appeal w[illegible] costs.

The 10th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Splitting a Decree.

Case No. 235 of 1875.

Miscellaneous Appeal from an order pass[illegible] by the Officiating Judge of Midnapor[illegible] dated the 8th May 1875.

Wooma Churn Chowdhry and others (Judgment-debtors), *Appellants,*

versus

Kumolay Kaminee Dabee (Decree-holder), *Respondent.*

Baboo Sham Lall Mitter for Appellants.

Baboos Umbika Churn Banerjee and *Mohin[illegible] Mohun Roy* for Respondent.

Where a judgment-creditor proceeding to execute a decree for land and certain papers failed to find the papers, and then instituted further proceedings, either to get them, or the money payable in default, HELD that he had adopted the only course open to him, and there was no splitting-up of the decree into different executions.

Glover, J.—This appeal must be dismissed with costs.

The objection that the Judge was wrong in the way in which he considered the original decree is one which cannot be taken at this stage. The point was considered by the Judge's predecessor in the presence of both parties, and was decided unfavourably to the decree-holder. If the latter thought that *that* decision was wrong, it was his duty to have appealed from it. The question is not now before the Court. The decree which is now being executed is one giving possession of lands and of certain zemindaree papers, or in default of them a thousand rupees. And it is a question of evidence whether the papers which were decreed to the decree-holder have been given up or not. The Judge finds that they have not; and we have not been shown that the

e's order on this part of the case is g. It is in evidence that the parties t to the mofussil to receive possession of land and zemindaree cutcherries. The r were found to be locked; and it was after a petition to the Judge that orders received to break open the locks, and deliver the papers to the judgment-credi-. There is very good evidence that no pers of importance were found in the m. An objection has been taken that s is a splitting-up of the decree in execu-n, that is to say that the decree ought have been executed at once, and could t be divided into one execution in respect the land, and into another execution in pect of the papers. But, as a matter of t, there was no such splitting-up of the cree, the judgment-creditor went to the t to get possession of the land as well as e papers, and not having got the papers, his ly course was to institute further exe-tion-proceedings, either to get them, or e money made payable to him by the first cree in default.

The appeal is dismissed with costs.

The 10th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

eclaratory Decree—Removal of Attachment—Execution.

Case No. 237 of 1875.

Miscellaneous Appeal from an order passed by the Officiating Judge of Midnapore, dated the 30th June 1875, reversing an order of the Moonsiff of Namal, dated the 22nd May 1875.

Boydo Nath Shaw (Decree-holder), *Appellant,*

versus

Shumbhoo Ram Mitee (Judgment-debtor), *Respondent.*

Baboo Rajendro Nath Bose for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

A decree declaring that an attachment should be removed cannot be executed for money.

Mitter, J.—In this case we think that the District Judge has taken a correct view of the decree sought to be executed. It was a decree declaring that the attachment made by the defendant of a certain quantity of crop belonging to the decree-holder should be removed. In execution of that decree, the decree-holder could not realize any money from the judgment-debtor. We therefore think that the Judge's view of the decree is correct. But it has been stated that the judgment-debtor deposited a certain sum of money, alleging that the decree-holder was entitled to it under the decree. It appears that, when this money was lodged, the decree-holder disputed the correctness of the amount, and alleged that, under the decree, he was entitled to more. The Moonsiff held that the decree-holder's contention was right, and ordered the amount mentioned by him to be deposited. On appeal the Judge has held that the decree cannot be executed for money. We have already observed that this is a correct view of the decree; and as the debtor was not willing that the money deposited in Court should be made over to the decree-holder, we also think that the Judge was right in holding that the decree-holder could not obtain the money in the hands of the Court without the consent of the debtor.

The appeal is dismissed with costs.

The 10th January 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Special Appeal—Issues.

Case No. 2065 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 21st January 1874, affirming a decision of the Moonsiff of Netrokona, dated the 18th December 1872.

Sreemutty Jumeela Khatoon and others (Defendants), *Appellants,*

versus

Boydonath Shaha (Plaintiff), *Respondent.*

Baboos Anund Mohun Bose, Mohinee Mohun Roy, and *Nullit Chunder Sen* for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

The High Court refused to disturb the decision of the lower Courts in order to the trial of an issue for the first time distinctly pressed in special appeal.

Macpherson, J.—We shall not interfere with the decision of the Lower Appellate Court in this case. That Court, agreeing with the Court of first instance, found that possession was at one time with the plaintiff, and that the suit was not barred by limitation.

Then the Lower Appellate Court has also found, concurring with the first Court, that the land was in Putruka Saripore, and not in Mathalgram. This was substantially the issue upon which the defendants went to trial in both the lower Courts, and on which we may add that they intended to go to trial.

That being so, we are not prepared to disturb the decision of the lower Courts in order that the issue (now for the first time distinctly pressed), that this land, though in Putruka Saripore, is the defendant's talook-land, may be tried.

The appeal is dismissed with costs.

The 11th January 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Lessee—Act XI. of 1859, s. 37.

Case No. 2360 of 1874.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 10th June 1874, reversing a decision of the Additional Subordinate Judge of that District, dated the 27th June 1873.

Grish Chunder Banerjee and another (Plaintiffs), *Appellants,*

versus

Sreemutty Gunga Doorga (Defendant), *Respondent.*

Baboos Doorga Mohun Dass and *Rash Beharee Ghose* for Appellants.

Baboos Kashee Kant Sen, Nullit Chunder Sen, Bhyrub Chunder Dass, and *Bhoobun Mohun Doss* for Respondent.

Where a party had occupied land for about 40 years under a howla-lease, and had made tanks, gardens, and homesteads, he was held to be protected under Act XI. of 1859, s. 37.

Macpherson, J.—The howla-lease under which the defendant held the land provided for the digging of tanks, and m ing homesteads and gardens. The Ju has found as a fact that the defendant occupied the land for about 40 years, has incurred expense in excavating tanks making gardens, and erecting homeste and he therefore held that she was protec under the 4th Exception to section 37 Act XI. of 1859.

Upon the facts as he finds them, we th the Judge's decision is right, and we the fore dismiss the appeal with costs.

The 11th January 1876.

Present:

The Hon'ble Louis S. Jackson and W. McDonell, *Judges.*

Mortgage-bond—Multifariousness.

Case No. 283 of 1874.

Regular Appeal from a decision passed the Subordinate Judge of Jessore, da the 31st July 1874.

Krishna Gopaul Ghose (Plaintiff), *Appellant,*

versus

Hurry Nath Dutt and others (Defendants) *Respondents.*

The Advocate-General and *Baboo Gopal Lall Mitter* for Appellant.

Baboos Mohiny Mohun Roy, Rash Behar Ghose, and *Mutty Lall Mookerjee* fo Respondents.

In a suit on a single mortgage-bond where part of th property concerned is conveyed, or alleged to be co veyed, to different persons, all these are entitled to notic and to be made parties. Such a suit is not multifarious

Jackson, J.—It appears from the repre sentations of both the parties before us to-da that, whereas the suit, as brought in the Court below, involved the trial of a number of questions of law and fact upon several of

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h questions evidence was material to given and the parties were prepared to such evidence, the Court, at the instance e defendants, inquired in the first in-ce only into two issues in bar of the and those two issues being determined hat Court in favour of the defendants, ence on questions of fact was therefore uded: Consequently, if this Court should concur in the decision of those questions the lower Court, the suit will have e remanded under section 351 of the e of Civil Procedure. The two ques-s which have been so determined by the r Court are, first, the objection of tifariousness. On that point the Court w relies upon a precedent printed in Weekly Reporter, pp. 15 and 16. has been pointed out by the learned vocate-General, and the respondents did venture to question that the said prece-t does not include such a case as that re us. The case in 8 Weekly Re-er is one where an heir, under the Mitak-ra Law, brought a single suit against a nber of defendants to recover possession portions of the immoveable family-pro-ty which the ancestor had, at various es, alienated to those different persons, and Court held that it was not reasonable t the several alienees should be obliged take part in a defence when portion of suit related to entirely different property, l involved different causes of action in ch they were not concerned. The pre-t suit is brought on a single mortgage-d, and part of the property concerned ing been conveyed, or alleged to have n conveyed, to different persons, all those sons were entitled to notice and to be de a party in the suit. The suit therefore s not in its nature multifarious. Nor s the stipulation contained in the decree the High Court in its original jurisdiction y bar to the present suit. For reasons culiar to the practice of the Court on the ginal side, the plaintiff was restrained, as the practice in similar cases, from exe-ting that decree against the mortgaged perty; but that did not dispose of or haust the plaintiff's right of lien on the ortgaged property, and there was nothing atever to prevent his setting up a mort-ge-right in the present suit. The reasons which the suit has been dismissed by the urt below being such as we think are valid, the case must be remanded under ction 351 in order that the remaining issues ay be tried and evidence given.

The 30th November 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Mokurruree Lease without Consideration—Mortgage.

Case No. 299 of 1874.

Regular Appeal from a decision passed by the First Subordinate Judge of the 24-Pergunnahs, dated the 24th July 1874.

Anund Lall Dass (one of the Defendants), *Appellant,*

versus

Goopee Chand Doogur (Plaintiff), *Respondent.*

Mr. Reily and *Baboo Gopal Lall Mitter* for Appellant.

Baboos Mohiny Mohun Roy, Debendro Chunder Ghose, and *Bamachurn Banerjee* for Respondent.

A mokurruree lease without consideration granted in favour of the grantor's general agent, who had sustained fiduciary relations with him, was held to be inoperative as against a mortgagee for good and valid consideration under a kobala of later date.

Jackson, J.—We do not think it necessary in this case to call upon the respondent. The learned Counsel, who appeared on behalf of the appellant, has, with sound discretion, confined himself to the topic of the alleged mokurruree lease granted to the defendant, Anund Lall, which he contends was granted for a good and valid consideration, and is not invalidated by anything shown in the case of the plaintiff. It is contended that the consideration for this lease was really existent

in the shape of balance standing in the books of Messrs. Gillanders and Chandra at the credit either of Anund Lall or of Bolye Chand himself. On that part of the case it appears to us that the evidence of Baboo Gunnesh Chunder Chandra, who was a member of the firm of Gillanders and Chandra, and the evidence of Jogendro Chunder Banerjee, who was a cashier of that firm, effectually disposes of that part of the defence. It is quite clear that the balance was not at any time at the disposal of Bolye Chand, but it was at the credit of Anund Lall, and was in fact nearly all of it subsequently applied to the payment of the claims of the firm of the attorneys of Anund Lall himself, but that a small sum of Rs. 100 found its way into the hands of Bolye Chand, not as part of the consideration for the lease, but as a loan. Then, as to the circumstances under which this mokurruree pottah was executed, it is quite evident that, at the time of this and the other transactions referred to in this suit, Bolye Chand was a very young man, 19 or 20, or at the most 21 years of age. He appears to have been entirely wanting in ordinary prudence, care, and knowledge of the common affairs of life. He seems to have at the very outset plunged into debts, and to have got into the hands of various attorneys and of speculators who made use of him for their own purposes, and the whole of his substance appears to have been involved in debts and endless litigation, and it was at this time, when he was involved in litigation, and his concerns were entirely in the hands of Anund Lall, that it was proposed to him to grant this mokurruree lease. It is clear from the evidence of Beni Madhub Palit, and in fact it comes out a little from the evidence of Anund Lall himself, that Bolye Chand was not inclined to grant this lease; that he was constantly solicited to do it; that the pottah was prepared long before he gave his signature to it; and that he had been repeatedly pressed and solicited before it could be got signed; and that the moment it was signed it was carried to the Registrar's office for registration. Regard being had to the relation which existed between Bolye Chand and Anund Lall, and to the entire absence of consideration, it appears to us that this lease cannot be allowed to stand as against the plaintiff, and that the plaintiff was justly entitled to the relief granted him by the Court below. The appeal is dismissed with costs.

The 2nd December 1875.

Present:

The Hon'ble Louis S. Jackson and W. McDonell, *Judges.*

Presumption—"Omnia præsumuntur rite esse acta."

Case No. 66 of 1875.

Special Appeal from a decision passed by the Judge of Dacca, dated the 1st August 1874, affirming a decision of the Moonsiff of Manickgunge, dated the 10th January 1874.

Arman Khan and others (Plaintiffs), *Appellants,*

versus

Bama Soonduree Dossee and others (Defendants), *Respondents.*

Mr. Stokoe and *Baboos Hem Chunder Banerjee* and *Bhowanee Churn Dutt* for Appellants.

Baboo Sreenath Banerjee for Respondents.

The proceedings of a public officer must be presumed to be regular; and if they took place long ago (e.g. 20 years previously), it is not just to require proof of such circumstances as due service of notice.

Jackson, J.—The plaintiffs really made out no case. The defendants cannot be bound by the fact that they took land according to the boundaries laid down in Mr. Littledale's map, because it is clear that complaint was made of inaccuracy of that map, and by an order of the District Officer in 1845 a Deputy Collector, Moulvie Reazuddin, was deputed to hold an inquiry, the result of which was the rectification of that map. It is contended that there is no evidence to show that the plaintiff's predecessor had notice of these proceedings, but the District Judge, it appears to us, has not gone further than it was necessary in allowing force to these proceedings. It must be remembered that these were proceedings of a public officer, and in such a case the ordinary maxim, "*Omnia præsumuntur rite esse acta,*" should apply, and in aid of that maxim it must also be borne in mind that a certain person named Shib Kristo Sen is actually declared by the Deputy Collector to have appeared on behalf of the plaintiff's predecessor, Aghur Ali. These are circumstances occurring so long back as 20 years, and it would be quite unjust to call upon the defendants to prove, over and above the presumptions arising from these proceedings

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in point of fact the plaintiff's predeces- had notice. The fishery in dispute, it ears, has always been in the possession of defendants, and it seems to us that the rts below were quite right in holding that ler these circumstances the plaintiffs de out no such case as entitled them to over possession. Then it is contended as ards a small portion of the land said to lying beyond the boundaries of Moulvie izuddin's map that, as the defendants im land lying within those limits, the d lying outside those limits should at any have been given to the plaintiff. But question is not what title the defendants ld make out, but what title the plaintiffs wed. The special appeal is dismissed h costs.

The 2nd December 1875.

Present:

The Hon'ble F. B. Kemp, *Judge.*

ror of Calculation—Review—Special Appeal.

Case No. 1606 of 1874.

ecial Appeal from a decision passed by the Judge of Patna, dated the 31st March 1874, affirming a decision of the Moonsiff of Behar, dated the 24th February 1872.

Mirza Akbur Ali and others (Plaintiffs), *Appellants,*

versus

Mullick Mukhdoom Buksh and others (Defendants), *Respondents.*

oonshee Mahomed Yusuf for Appellants.

r. R. E. Twidale and *Moonshee Abdool Baree* for Respondents.

Where a judgment contains such an error as a mis-lculation of the claim decreed, it can be rectified by a application made in due time; and, in the absence the Judge, the law admits of his successor amending reviewing the judgment on good cause shown. But ch error is not a ground for the High Court's inter-rence in special appeal.

If the importance of this case is to be udged by the length of the argument, then should hesitate, before passing judgment, itting alone, and I should probably act upon he suggestion thrown out by the pleader for he special appellant to reserve it for a Bench of two Judges. The argument has been a very lengthy one, and I have allowed it to be so, because, as I have already said, I am sitting alone, and because the decision appealed from was passed by a Judge who is now one of the Judges of this Court.

The suit was for rent for the years 1276 to 1278, and the amount claimed was Rs. 187. The defendant, the ryot, and the intervenor, Mukhdoom Buksh, seem to have made common cause in the case, and to have resisted the plaintiff's claim to a portion of the rent. The Moonsiff gave the plaintiff a modified decree for Rs. 179-8; that is to say, that, out of a claim of Rs. 187, he deducted Rs. 7-8.

On appeal to the Judge, he, on consideration of the High Court's decree, dated the 7th April 1870, upon which the intervenor relied, held that it was clear that the High Court had decided that no mokurruree right had passed to Mukhdoom Buksh by his purchase, and consequently that he was not entitled in the present suit to claim any share of the mokurruree rent. In this view, the Judge decreed to the plaintiff the whole of the claim.

Then there was a special appeal, and that special appeal was heard by a single Judge, Mr. Justice Phear. The learned Judge on the 28th August 1873, after giving a detailed history of the case, and holding that the Judge had misapprehended the meaning of the decision of the High Court already referred to, remanded the case for trial of the following issue, namely: "What portion "of the rent reserved under the mokurruree "pottah which was mentioned in the plaint "did the intervenor Mukhdoom Buksh, "special respondent before him, *become* "*entitled to*" (these words are important) "by reason of his purchase of the 4 dams "16 cowries 4 bhowries 3 fowries share "which he is declared by the High Court's "decree to have purchased from Hyderee "Begum." On that issue going back for trial to the Zillah Court, the Judge admits in his decision that he was wrong in his former decision, and also wrong in his interpretation of the meaning of the decision of the High Court already quoted. He now finds on the issue laid down by the remanding Judge that the total jumma of the mokurruree of Magh 1246 is Rs. 225, and that after deducting the mokurruree three-fourths share, the one-fourth or milkeut share was Rs. 56-4 (this much is admitted by both parties); that on this proprietary share Imam Beg's share was Rs. 18-12, this is also admitted by both parties; that again one-half of this or Rs. 9-6 was Hyderee Begum's share by purchase, and that one-sixth of the remaining half or Re. 1-9-6

was Hyderee Begum's share by inheritance from her mother Jeebunnissa. Therefore, says the Judge, Hyderee Begum's proprietary share in the jumma was Rs. 9-6 *plus* Re. 1-9-6, which she obtained by inheritance from her mother, or total Rs. 10-15-6, which is exactly the amount claimed by the intervenor. Hence, says the Judge, the order of the Moonsiff deducting the share due to Mukhdoom Buksh is correct, and he dismissed the appeal with costs. I may here add before I proceed to judgment that the Moonsiff does not deduct Rs. 10-15-6, but deducts only Rs. 7-8, inasmuch as the intervenor admitted that up to Falgoon 1278 he had not collected the rents; that the plaintiff was entitled to collect up to that date; and on that account Rs. 3-7-6 as admitted by the intervenor was deducted from the Rs. 10-15-6, and the balance Rs. 7-8 was deducted from the original claim, and a decree passed in favour of the plaintiff for the remainder, which decree was upheld by the Judge.

In special appeal three grounds were taken: first, that on the Judge's own showing, the Judge is wrong in deducting the amount which he has deducted from the special appellant's claim. Now, this ground, standing alone, is not a ground on which this Court would interfere in special appeal. If, on the Judge's own judgment, he has committed an error in deducting the amount from the plaintiff's claim, that could have been rectified by an application in due time to the Judge to amend his decree. The special appellant's pleader has stated that the Judge who passed the decree is no longer the Zillah Judge; but there was ample time for the Judge who passed the decree to amend it, inasmuch as he was not appointed to be a Judge of this Court until some time after the decree was passed, and even in his absence, the law admits of his successor amending or reviewing his predecessor's judgment on good cause being shown. Therefore the first ground taken is untenable.

The second ground is that, when the onus was on the intervenor, he was bound to show the particular rents to which he is entitled. Now it so happens that the question of onus was before Mr. Justice Phear when remanding the case, and that learned Judge says that perhaps he ought to hold that the onus was on the intervenor-defendant, Mukhdoom Buksh; but he expressly stated that he was reluctant to determine the case on a mere question of onus, and he therefore remanded the case, giving both parties opportunity to file evidence on the iss which he thought proper to lay down remanding the case. Now, as a matter fact, the defendant has fully discharged onus which was on him, namely, he has fil the decision of the High Court which h already been referred to in the course of th judgment which shows the particular re to which he is entitled.

Then the third ground of appeal is, that th intervenor should have given evidence actual collections of rent in order to sho his right to a particular rent. Now th was not the issue raised by the learne Judge who remanded the case; the iss was not what the intervenor had actual collected, but what he was entitled to collec or, to use the words of the learned Jud himself: "What portion of the rent reserv under the mokurruree pottah did the inte venor become entitled to by reason of purchase of the 4 dams 16 cowries 4 bho ries 3 fowries share which he is declar by the High Court's decree to have pu chased from Hyderee Begum." There fore it would be sufficient to dismiss th special appeal on the ground alone that n valid ground of special appeal has been mad out; but as there has been considerable argu ment in this case, and as the pleader for th plaintiff, appellant, has very ably contende that the Judge was wrong, I have take some extra trouble, which was not necessa perhaps in special appeal, to discove whether there was any error in the judg ment of the lower Court, and I must con fess that I can find none. It is clear tha the jumma reserved in the pottah wa Rs. 225. All parties admit that one-fourth was the milkeut right which would b Rs. 56-4, and all parties also admit tha Imam Beg, the son of the original grantee Shahbaz Beg, had one-third of the milkeu right which would represent a jumma o Rs. 18-12. Then it is also admitted tha the intervenor has purchased the rights o Hyderee Begum, and it has been established that these rights on the total jumma were Rs. 9-6 in her own right by purchase, and Re. 1-9-6 in right of inheritance from her mother Jeebunnissa, or altogether Rs. 10-15-6; and this is the sum which has been deducted from the plaintiff's claim *minus* Rs. 3-7-6 allowed by the defendant, inasmuch as he did not collect up to Falgoon 1278.

The decision of the Judge is therefore correct both in law and fact, and the special appeal must be dismissed with costs.

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The 8th December 1875.

Present:

The Hon'ble Sir Richard Garth, *Kt., Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Ejectment by Collector—Limitation.

Case No. 313 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 23rd. November 1874, affirming a decision of the Additional Sudder Moonsiff of that District, dated the 15th December 1873.

Azeezooddeen Mahomed (one of the Defendants), *Appellant,*

versus

Mahomed Meajan (Plaintiff), *Respondent.*

Moulvie Murhumut Hossein for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

A party, whose object is to establish his title to property from which he has been turned out by the collector, may bring his suit within twelve years.

Garth, C.J.—We are concluded by authority in this case. There have been decisions in this Court (7 Weekly Reporter, p. 153, and 8 Weekly Reporter, p. 294), which clearly show that, where the object of a party, who has been turned out by the Collector, is to establish his title to the property, he can bring his suit within twelve years. The restriction in section 77 of Act X. of 1859 does not apply to him. The appeal, therefore, will be dismissed with costs.

The 8th December 1875.

Present:

The Hon'ble Sir Richard Garth, *Kt, Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Ameen's proceedings—Possession.

Case No. 13 of 1875.

Special Appeal from a decision passed by the First Subordinate Judge of Mymensingh, dated the 24th September 1874, reversing a decision of the Additional Moonsiff of Atteah, dated the 12th September 1873.

Janokee Nath Chowdhry (Plaintiff), *Appellant,*

versus

Berjendro Coomar Roy Chowdhry and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Kalee Mohun Dass and *Sreenath Dass* for Respondents.

Where an ameen measured and mapped land and altered his map on objection made, the proceedings, as being merely upon paper, and not interrupting the actual possession or occupation of the land, were held not to amount to an act of ownership by either of the parties concerned or to affect the question of possession.

Garth, C.J.—We have given our best consideration to this case, not only on account of its importance, but also because there were some portions of the judgment of the Lower Appellate Court which struck us as not being quite satisfactory; but, on the whole, we do not see any ground for disturbing the decision at which it has arrived. Undoubtedly he, the Subordinate Judge, has tried the right issues. The first issue which he decided to try was, whether the plaintiff had been in possession within twelve years before the institution of the suit; and, with regard to that, he says that he has fully considered the deposition of the plaintiff's witnesses, and he finds their evidence so unsatisfactory, that he cannot, upon such evidence, believe that the plaintiff had been in possession during twelve years. In point of fact, he finds that he has not been in possession during the twelve years. That was purely a question of fact for him; and we cannot, of course, go into the facts for the purpose of ascertaining whether he has decided it rightly.

But then it is said, that in 1864 there were certain proceedings which amounted to an act of ownership on the part of the plaintiff's predecessor. If we thought that what occurred at that time really resulted in the land being taken possession of, and actually occupied, by the plaintiff, we should be very much disposed to send the case back for a re-trial on the ground that there was a question which had not been properly considered by the Subordinate Judge. But when we consider what those proceedings really were, we find that they were all upon paper, and need not in the slightest degree have disturbed the possession of the persons who at that time occupied the land.

It appears that an ameen was sent to the land for the purpose of ascertaining the rights of the defendants *inter se;* and for that purpose, and in order to make a map of the locality, he went to the land and made his measurements. Then it seems that the plaintiffs on seeing the map made by the ameen objected to it on the ground that the area which the ameen had marked out as belonging to some of the defendants included a part of the village which the plaintiff claimed. On this objection being made, the ameen altered the map, and excluded the land claimed by the plaintiffs. But this was all upon paper. Nobody went upon the land except the ameen himself, and he went there before the question arose. There is nothing to show that the persons who were in the actual occupation of the land, the ryots, knew for what reason the ameen was making his measurements; and even if they did, nothing is more likely than that they would have allowed him to make them without interruption. Those proceedings, therefore, cannot be considered to amount to an act of ownership by either of the parties. It is not suggested that at that time the plaintiffs took any steps (although one would have thought that if the property really belonged to them, they would have done so) for the purpose of turning out any persons who were occupying the land on the part of the defendants.

The proceedings which were merely upon paper were quite consistent with the possession of the property being in the defendants, or in any third person other than the plaintiffs. They did not, in the smallest degree, interrupt the actual possession or occupation of the land; and, consequently, the Judge might very properly have considered that they did not affect the question of possession. They would, no doubt, be important when it came to a question of title, but that was the second issue in the case. The first issue, as we have already stated, was whether the plaintiff had been in *possession during the twelve years previous to the suit*, and the Subordinate Judge found that issue in the negative. That being so, we do not see how we can disturb his decision; and what is more important (although we must say that it would have been more satisfactory to me and to my learned colleague if another trial could have been had) we do not think we are authorized under the Procedure Code to send the case back for a new trial.

The appeal will, therefore, be dismissed with costs.

The 9th December 1875.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Landlord and Tenant—Limitation.

Case No. 889 of 1875.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 2nd February 1875, affirming a decision of the First Subordinate Judge of that District dated the 6th July 1874.

Rajkishore Surma Chuckerbutty and another (Defendants), *Appellants,*

versus

Grija Kant Lahiree Chowdhry (Plaintiff), *Respondent.*

Baboos Gopal Lall Mitter and *Kalee Kishen Sen* for Appellants.

Baboos Sreenath Dass and *Bussunt Coomar Bose* for Respondent.

Payment of rent proves the relation of landlord and tenant; and where that exists, no question of limitation can arise.

Garth, C.J.—We think that this appeal should be dismissed. There are two points raised by the appellant. In the first place it is said, that the Lower Appellate Court was wrong in holding that the question of limitation did not arise in respect of plots Nos. 2 to 13 on account of the fact being admitted that the relation of landlord and tenant existed between the parties. But if the relation of landlord and tenant did exist,

is clear no question of limitation would se, and the Court was right in so holding. idence was given on both sides to show t rent had been paid by the defendant to e plaintiff: and that being so, we consider e Judge was right in deciding that the ation of landlord and tenant had been oved to exist.

As to the second point, it is said, that if e relationship of landlord and tenant exist- between the parties, the plaintiff ought have given the defendant notice to quit. his point was not taken in the Court of e Subordinate Judge, nor in the Lower ppellate Court. It is now taken here for e first time, and for aught we know otice to quit may, in fact, have been given. ut as the point was not taken until the ase arrived at this stage, we cannot listen o it.

The appeal must, therefore, be dismissed ith costs.

The 22nd December 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Pre-emption—Limitation—Act IX. of 1871, Sch. II., art. 10.

Case No. 595 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 16th December 1874, reversing a decision of the Moonsiff of Fenchoogunge, dated the 24th August 1874.

Noziba Khatoon (one of the Defendants), *Appellant,*

versus

Mahomed Johur and another (Plaintiffs), *Respondents.*

Baboo Joy Gobind Shome for Appellant.

Baboo Rajendro Nath Bose for Respondents.

Against a party suing to enforce a right of pre-emption, limitation runs from the time of actual possession under the sale which he seeks to impeach, and the period of such limitation is one year; but he is not bound, on hearing of a sale, to wait until the year has expired.

Kemp, J.—This was a suit on the part of the plaintiffs based on the right of pre-emption.

The defendants alleged that the plaintiffs were never desirous of purchasing this land; that they never expressed any intention of doing so; and that they never performed any of the preliminary conditions of pre-emption, or offered the defendants any consideration-money.

The Moonsiff dismissed the plaintiffs' suit. He held that the suit was premature, inasmuch as the vendee had not taken possession, and because it was with reference to ijmalee property that the right was claimed.

The Subordinate Judge reversed this decision and found that the suit of the plaintiffs was not premature; that the plaintiffs, if they could prove that they are the shuffá-e-shureeks, and have conformed to the terms of the Mahomedan law in performing the requisite ceremonies, would be entitled to obtain possession in the form in which the property was held by the vendors On the question of fact, the Subordinate Judge found that it was proved by the witnesses that the plaintiffs went through the preliminary form of Tullub-i-moasibut, and also that they performed the Tullub-i-ishtisháad.

One of the defendants, Noziba Khatoon, appeals to this Court, and her pleader contends that there is no evidence that the plaintiffs, as found by the Subordinate Judge, complied with the requirements of Mahomedan law. We have had the evidence of one of the witnesses read to us, and we have no hesitation in saying that the Subordinate Judge is perfectly correct in his decision.

The next point urged before us is the point of limitation. With reference to this question, we hold that the Subordinate Judge was also correct. The plaintiffs brought their suit on hearing of the sale to the other parties. The limitation laid down in Schedule II. of Act IX. of 1871, art. 10, provides that the period of limitation will run adversely against a party suing to enforce a right of pre-emption from the time when the purchaser takes actual possession under the sale sought to be impeached, and that period is one year. The law does not lay down that a plaintiff claiming a right of pre-emption is bound, on hearing of a sale, to wait until the year has expired.

On the third point, namely, that the suit being one to recover possession of a portion of the land jointly, cannot be maintained, we find that the plaintiffs sued to have it declared that the deed-of-sale is inoperative as against them, inasmuch as they are entitled to the right of pre-emption as shuffá-e-shureeks. As it has been found by the Subordinate Judge that they have that right,

and that they have performed the necessary ceremonies according to Mahomedan law, we do not see any reason why the plaintiffs should not have the decree which they obtained from the Subordinate Judge, namely, that they will be entitled to possession in the form in which the property was held by the vendors.

The special appeal is dismissed with costs.

The 5th January 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Compromise—Record of Suit—Office Copy.

Case No. 3067 of 1874.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 10th September 1874, reversing a decision of the Deputy Commissioner of Lohardugga, dated the 4th November 1873.

Bhagain Megh Ranee Kooer (Plaintiff), *Appellant*,

versus

Gooroo Pershad Singh (Defendant), *Respondent*.

Baboo Kalee Mohun Dass for Appellant.

Mr. R. T. Allan for Respondent.

Where a suit is compromised, and a petition is presented in the usual way, and the Court makes an order confirming the agreement which with the order, as well as the agreement and power-of-attorney, are all entered upon record, these papers become as much a part of the record in the suit as if the case had been tried and judgment given between the parties in the ordinary way; and that record is a public document and may be proved by an office copy.

Garth, C.J.—THIS was a suit brought by the plaintiff to recover possession of a certain village. It was admitted at the trial that she had a proprietary title to this village; and it was also admitted that the defendant was entitled to receive from her certain maintenance. It appears that for some time litigation had been going on between these parties, and in one suit, which was commenced by the present defendant against the present plaintiff, an agreement was come to for the purpose of settling their disputes; and for the purpose of getting that agreement properly executed, a power-of-attorney was given to the vakeels by both parti By the terms of that agreement, instead the maintenance to which the present defe ant, the then plaintiff, was entitled, it arranged that he should hold possession receive the profits of the village which the subject of this suit.

In answer then to the plaintiff's case (plaintiff being, as we have already stat confessedly entitled to the property), t defendant set up this agreement which h been come to in the former suit. To t the plaintiff objected, and now objects special appeal, that no proper evidence w adduced in Court to prove either the powe of-attorney or the agreement which w executed in accordance with it.

There certainly is some little difficulty i ascertaining from the record what th evidence really was; but, looking carefu into the proceedings, we think that th evidence is sufficient to establish both th power-of-attorney and the agreement.

It seems that, when the former suit w compromised and the arrangement whic we have mentioned arrived at between th parties, a petition was presented in the usu way to the Court in that suit, that th arrangement should be carried out; and upo that petition the Court made an order co firming the agreement, and then the powe of-attorney, the agreement, and the orde made by the Court were all entered upo record, and became as much part of th record in the suit as if the case had bee tried in a hostile manner, and judgment give between the parties in the ordinary way That record, therefore, is a public document and as such may be proved by an offic copy. In this suit, an office copy of th record in the former suit was produced i Court; and it also appears that the Judicia Commissioner sent for the original proceed ings and examined them. Here we have on the office copy of these proceedings, an *primâ facie* we must take it that everythin that appears there is correct, and has bee properly carried out.

Then the plaintiff objects that she neve properly executed the agreement, nor signe the power-of-attorney. If that were so, sh ought, when the defendant took possessio of the village, to have instituted a suit to s aside these proceedings in the former sui upon the ground that they were unauthorize by herself. Instead of doing this, she no attempts in this suit to prove that these proceedings (which are *primâ facie* honest and correct) were either forgeries, or exe-

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d in such an improper way, that she is bound by them.

he evidence which she adduced upon part of the case was oral evidence; and question whether she had, in point of fact, n improperly induced to enter into this eement was a question of fact. This stion the Judicial Commissioner has ided against the plaintiff, and we cannot urb his decision.

We think, therefore, that there is no good on for disturbing the decision of the er Court, and the appeal will be dis-sed with costs.

The 5th January 1876.

Present:

The Hon'ble W. F. McDonell, *Judge.*

Special Appeal—Multifariousness.

Case No. 793 of 1875.

ecial Appeal from a decision passed by the Officiating Subordinate Judge of Furreedpore, dated the 11th January 1875, reversing a decision of the Moonsiff of Muksoodpore, dated the 31st January 1874.

Loke Nath Sircar (Plaintiff), *Appellant,*

versus

Modhoo Soodun Shaha and another (Defendants), *Respondents.*

Baboo Bungshee Dhur Sen for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondents.

The High Court refused to interfere in special appeal ith a Lower Appellate Court's order dismissing a suit n the ground of multifariousness, as there had been no ror of law.

THE only question in this case is whether he Lower Appellate Court has committed n error in law in dismissing the plaintiff's uit *in toto* on the ground of multifarious-ess. Without saying anything as to what his Court would have done had the case ome before it in regular appeal, this Court olds that, in special appeal, it cannot inter-ere with the judgment of the Subordinate udge. One of the defendants was clearly iable for only one offence, whereas the ther was liable for two. The decree assed was a joint decree, and it is difficult to say for what offence what amount of damages has been awarded, and, therefore, one defendant may possibly have been pre-judiced by the joining of the two causes of action together. Be this as it may, in special appeal this Court holds that, as there has been no error in law, it cannot interfere with the judgment of the Lower Appellate Court. The appeal is dismissed with costs.

The 6th January 1876.

Present:

The Hon'ble W. F. McDonell, *Judge.*

Receipt for Rent—Admission—Evidence Act, s. 115—Estoppel.

Case No. 877 of 1875.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 28th January 1875, modifying a decision of the Officiating Second Moonsiff of Baraset, dated the 6th July 1874.

Khanto Monee Debia (Plaintiff), *Appellant,*

versus

Koomodinee Debia and another (two of the Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Bykunt Nath Pal for Respondents.

A receipt for rent in which the zemindar styled herself "zemindar of 4 annas," but which showed that the ryot did not pay the zemindar the full 4 annas share of the rent, was HELD not to bar the ryot from questioning the landlord's title. A defendant is not estopped by a statement made by him in another suit in which plaintiff was no party.

THE two points raised in this appeal are, *firstly*, that the defendant being the tenant and having paid rent to the plaintiff as zemindar of a 4-anna share could not now question the right of the landlord; and, *secondly*, that the statement of the defendant in another suit is conclusive evidence against the defendant. With regard to the first objection, it appears that the only evidence adduced to show that the defendant acknowledged the plaintiff as zemindar of 4 annas is a receipt filed by the defendant in which the plaintiff styled herself as zemindar of 4 annas, but it is clear that the ryot did not pay the zemindar the full 4 annas share of the rent. The mere fact of the

plaintiff having styled herself to be the 4 annas shareholder cannot bar the right of the ryot to question the landlord's title. With regard to the second objection, the statement made by the defendant was in a suit in which the plaintiff was no party, and it is certainly not one which, under section 115 of the Evidence Act, could be held to be an estoppel. The special appeal must be dismissed with costs.

The 10th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Decree—Execution—Limitation.

Case No. 233 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 5th May 1875.

Doya Moyee Dabee (Decree-holder), *Appellant,*

versus

Nil Monee Chuckerbutty (Judgment-debtor), *Respondent.*

Baboo Becharam Mookerjee for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

So long as one part of an indivisible decree is being executed, the whole is kept alive, so far as the statute of limitations is concerned.

Glover, J.—This was an application for execution of a decree passed in January 1860 for certain moveable and immoveable properties. Execution was taken out at various times, and in 1863 possession was taken of all the properties decreed with the exception of five items. Nothing further was recovered between 1863 to 1874, although repeated processes were taken out. During the interim, the decree-holder sold the balance of her decree in respect of the costs in the first Court; and she is now taking out execution for the five items which she failed to take possession of in 1863, and also for the costs which were decreed in the High Court.

The Judge has considered, with respect to these five items, which he says consists of dhan and buffaloes, that the decree-holder abandoned her claim, inasmuch as ever since 1863 in the applications and processes for execution, no mention was made of them, the only applications since that year b for costs, and he has held the present a cation to be barred by the statute of li tions.

Now, it is very doubtful whether Judge was justified in stating that decree-holder had abandoned her cl There is nothing in the record to show And the decree being an indivisible one appears to us that, so long as one part of was being executed, the whole would kept alive, so far as the statute of limitatio is concerned. But the five items whi according to the Judge, consist of dhan a buffaloes, cannot form the subject of exec tion now. The decree gave dhan a buffaloes, particular dhan and particu buffaloes, with no equivalent of mon value to be obtained from the judgme debtor, supposing that the property decre could not be got at. It can hardly be this distance of time, seventeen or eight years since the decree was made, that particular dhan and buffaloes which w decreed, are to be traced, and as a matter fact the decree-holder admits that she d not know whether they exist or not, so th the decree so far has become infructuo There are no means of tracing the proper decreed, or of making it over to the decre holder.

But the Judge is not correct in stati that these five items consist only of dh and buffaloes. From the schedule to th application for execution it appears that amongst the property of which possessio was not obtained, there was a small piece o lakhiraj land. The vakeel for the jud ment-debtor, the respondent before us, do not deny its existence. His substanti defence, as we understand it, is that th decree-holder has abandoned her claim t this piece of land, and, therefore, cannot no take out execution in respect of it. We think, however, that the decree-holder can not be said to have abandoned her claim, and that there is nothing in law to prevent her from pursuing the decree which she got in 1860 to its full extent, and that, if she can now point out the particular piece o land decreed to her, she will be entitled to take out execution in respect of it.

It is not easy to understand how the Judge has fallen into this error, still less how the vakeel for the decree-holder did not apply to the Judge to review his judgment and to alter the mistake into which he had fallen. But as it is clearly a mistake, and as there is immoveable property in

ence which was included in the decree 860, and as to the identity of which is no doubt, the decree-holder is led to execute her decree in respect to, she not being, in respect of it, barred mitation.

t, under the circumstances, we consider the appellant is not entitled to costs. therefore, make no order as to costs.

The 11th January 1876.

Present :

The Hon'ble E. G. Birch, *Judge.*

y in applying for Process—Special Appeal.

Case No. 857 of 1875.

ial Appeal from a decision passed by e Subordinate Judge of East Burdan, dated the 11th January 1875, firming a decision of the Second Sudr Moonsiff of that District, dated the 9th January 1874.

Brojo Lall Mookerjee (Plaintiff), *Appellant,*

versus

Aughore Lall Ghosal and another (Defendants), *Respondents.*

Baboo Jugut Chunder Banerjee for Appellant.

Baboo Becharam Mookerjee for Respondents.

suitor who delays applying to a lower Court to its process within a reasonable time before the date for trial, and whose application is refused because ch delay, is not entitled to come up in special al and ask the High Court to compel the lower t to condone his carelessness and indifference to his interests.

HE ground of special appeal is that the rt of first instance has improperly refused ssue a fresh summons upon the plaintiff's nesses, and that, therefore, a substantial r in procedure has been committed which ht to be rectified by this Court in special eal. The same point was raised before Subordinate Judge, but he refused to ertain it because he thought that the intiff had unduly delayed his application serve summons upon his witnesses in the t instance, and had also improperly postned his second application.

On referring to the record, I find that the nes were fixed on the 18th of November, l the 19th of January was fixed as the day for trying the cause. The plaintiff appears to have in no way moved the Court until the 8th of January, when he deposited tulubana for the issue of summons on his witnesses. The writ of summons was returned on the 15th of January, service not having been effected, and it was not until the 19th of January, the date fixed for the trial of the suit, that the plaintiff came into Court again and asked for a fresh summons to be issued on his witnesses. This prayer the Moonsiff refused, and I concur with the Subordinate Judge in thinking that he was justified in refusing it. The difficulty of securing the attendance of witnesses in the mofussil Courts is well known ; and if the plaintiff chose to slumber till within a few days of the date fixed for trial, and delay asking the Court to issue its process within a reasonable time, he has only himself to blame, and is not, in my judgment, entitled to come up here in special appeal and ask me to compel the lower Courts to condone his carelessness and indifference to his own interests as a suitor.

The appeal is dismissed with costs.

The 12th January 1876.

Present :

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Lease by Guardians—Ratification by Minors.

Case No. 657 of 1875.

Special Appeal from a decision passed by the First Subordinate Judge of Rajshahye, dated the 15th September 1874, affirming a decision of the Moonsiff of Pubna, dated the 28th October 1873.

Ram Chunder Sircar (Defendant), *Appellant,*

versus

Pran Gobind Boishnub and others (Plaintiffs), *Respondents.*

Baboos Mohinee Mohun Roy and *Kishen Dyal Roy* for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondents.

Where minors, after coming of age, receive rents under a lease which was granted by their guardians during their minority, they thereby ratify the lease, and cannot afterwards repudiate it.

Macpherson, J.—IT seems to us that, on the Subordinate Judge's finding of the facts,

he ought to have dismissed the plaintiffs' suit.

The suit is brought by the three plaintiffs claiming to be put in possession of their shares (amounting in all to three annas) jointly with the defendants other than Ram Chunder Sircar (the appellant). The plaint states that the defendants (other than Ram Chunder Sircar) and the plaintiffs, or those whom they respectively now represent, were jointly entitled as shebaits to the property, the subject of suit; and that they were wrongfully dispossessed by Ram Chunder Sircar, the appellant, in Falgoon 1269, and have been kept out of possession by him ever since.

The facts as found by the Subordinate Judge are, that the plaintiffs and defendants (other than Ram Chunder Sircar), or those whom they represent, being jointly entitled to this property as shebaits, on the 29th of Falgoon 1269, on receiving a nuzzurana of Rs. 100, granted a permanent lease of the whole property to Ram Chunder Sircar, the appellant, at a rent of Rs. 127 per annum. Not one of the three plaintiffs with his own hands signed the lease. Two of them, Ram Lall and Kristo Gopal, were minors; but their respective mothers, who were their guardians, signed it for them. Pran Gobind was not present when the lease was granted: but the finding of the Subordinate Judge substantially is that Pran Gobind being absent from home, as he usually was, his elder brother, the defendant, Ram Soonder, acted for him. It is alleged by the appellant in his written statement, and it is found by the Lower Appellate Court to be the case that, during Pran Gobind's absence, Ram Soonder always acted in connection with this property on behalf both of himself and of his absent brother, and that he so acted in the matter of this lease.

The Subordinate Judge further finds that the plaintiffs have, all of them, ratified the lease by receiving rent—the two minors, after coming of age, and the plaintiff Pran Gobind, through his brother Ram Soonder. Rent having been so received by those who were minors, there is an end of all question as to the lease not being binding on them. And Pran Gobind's objection is disposed of by the finding that he left the management during his absence to his brother Ram Soonder.

The only other ground on which we are asked to set aside the lease is that the persons who granted it being all shebaits, and the lease being professedly granted to raise money for repairs to the temple, the [illegible] ought to be set aside, because it is not p[illegible] that there was a necessity for raising [illegible] money. If that was the case which [illegible] plaintiffs intended to make, it ought to [illegible] been stated distinctly in the plaint, so [illegible] the defendant, Ram Chunder Sircar, m[illegible] from the first, have known what he h[illegible] meet. But the case made by the plaint [illegible] simply that the appellant, Ram Chu[illegible] wrongfully dispossessed the plaintiffs: and [illegible] plaintiffs who had been minors, contendo[illegible] Court that the lease was never execute[illegible] all by their mothers, and indeed this i[illegible] was decided in their favour by the Co[illegible] first instance.

Possibly the plaintiffs might have [illegible] some chance of success if they had fra[illegible] their suit differently, and had properly ma[illegible] and confined themselves to the true is[illegible] in the cause. But as it is, they are [illegible] entitled to succeed.

The decree of the lower Court is reve[illegible] and the plaintiff's suit is dismissed [illegible] costs.

The 13th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Ex-parte Decree—Act VIII. of 1859, s. 119—Execution.

Case No. 277 of 1875.

Miscellaneous Appeal from an ord[illegible] passed by the Judge of East Burdw[illegible] dated the 31st May 1875, affirming [illegible] order of the Moonsiff of Kaneegun[illegible] dated the 13th January 1875.

Kalee Prosad (one of the Defendants), *Appellant,*

versus

Digambur Chatterjee (Plaintiff), *Respondent.*

Baboo Umbica Churn Banerjee for Appellant.

Baboo Bama Churn Banerjee for Respondent.

An application under Act VIII. of 1859, s. 119, having been rejected on the ground that it was made more than 30 days after a process for enforcing the *ex-parte* judgment had been executed, it was contended, in special appeal, that the application was within time because the

ant (judgment-debtor) had not been in possession time of ejectment of the tenant-defendants :
LD that the allegation that he had been obliged to his village, and settle in a place 24 miles distant, ot amount to a disclaimer of any interest in the rty, and that he could not say that the process by the decree-holder was put in possession was not a s executed against him.

itter, J.—It is admitted by the respon- that he cannot support the judgment of Lower Appellate Court on the ground on h it is based. But he contends that pendently of that ground, the order h has been passed by the Lower Appel- Court, rejecting the application of the ial appellant, is right, because the appli- n has been made more than thirty days a process for enforcing the *ex-parte* ment was executed. In support of this nd, he refers us to the date of the nal decree, which was passed on the July 1872. And he shows that, on the December 1872, in execution of that ee, the tenant-defendants were ejected. present application was not made until ust 1874.

pon these facts, which are not disputed, clear that this application has not been e within the time prescribed in section Act VIII. of 1859. But the pleader he special appellant contends that, not- standing these facts, his application is in time, because he had not been in pos- on of the property of which possession given to the decree-holder in December . And in support of his contention he es the case reported at page 210, 15 kly Reporter.

o doubt, according to this last authority, e applicant had stated and established the property of which possession was n by the decree-holder did not belong to , he would have had some ground on h he could have contended that the ess which was taken out in December was not actually executed against him, ause the process for delivery of possession d not have affected him, the property not g his. But, from the statements of the licant, as we can gather them from his lication under section 119, it appears to that it is not alleged that he has no in- st in the property. All that he states his—that, for certain reasons, he has been ged to leave his village and to settle in a e which is about 24 miles distant, and he has not been in possession of the s of which the decree-holder has obtained ession in execution of his decree. refore it appears to me that, as he does not disclaim any interest in this property, he cannot say that the process by which the property decreed was made over to the decree-holder was not a process executed against him. It is quite clear, therefore, that the present application has not been made within the time allowed by section 119, and we think that the respondent's contention is correct, and on that ground we uphold the order of the Lower Appellate Court, and dismiss the appeal with costs.

Glover, J.—I concur.

The 14th January 1876.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Jurisdiction—Small Cause Court.

In the matter of
Itcha Moyee Dossee, *Petitioner,*

versus

Bama Soonduree Dossee, *Opposite Party.*

Baboo Grija Sunkur Mojoomdar for Petitioner.

Baboo Bungshee Dhur Sen for Opposite Party.

The Court of Small Causes has no jurisdiction to entertain a suit for the recovery of money paid by A in liquidation of a debt due by B, where the case is not one of damage or of breach of contract.

Jackson, J.—It appears to us that this case comes within the principle of the case determined by the Full Bench (7 Weekly Reporter 377). The suit was brought by the plaintiff to recover back a sum of money which she had paid, which was properly the defendant's debt, and ought to have been paid by her. It was not a case of damage or of breach of contract. It was a case in which the defendant's liability arose out of the general principles of equity and justice. The Small Cause Court, therefore, had no jurisdiction to entertain the suit, and the decree of that Court must be set aside. As it appears that this objection was not taken in the Court below, the petitioner will not have the costs of this rule.

The 14th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Limitation—Jurisdiction—Act VIII. of 1859, ss. 303 and 304.

In the matter of Parkash Ojha, *Petitioner,*

versus

Dusruth Ojha and others, *Opposite Party.*

The Petitioner present in person.

Baboo Mohinee Mohun Roy for Opposite Party.

Where a Subordinate Judge decided the question of limitation, not upon the examination of the petitioner, but upon that of other witnesses summoned for a different purpose, he was HELD to have exceeded his jurisdiction.

Glover, J.—WE think that this rule must be made absolute, because, by sections 303 and 304 of the Code of Civil Procedure, the Subordinate Judge, in determining the question of limitation, was bound to proceed upon the examination of the petitioner, and upon that only.

In this case, it appears that certain witnesses were summoned and examined on the question of pauperism, and, on their examination, the Subordinate Judge chose to take up the question of limitation, and on their evidence to decide that the petitioner was barred. No doubt the petitioner himself was examined, but, if the Subordinate Judge has decided the question of limitation upon that examination, it is quite clear that the petitioner was not barred, because he swore positively that he was born in Pous 1262; and this suit was brought within three years after he had attained majority.

Then it is said that the case reported in 14 Weekly Reporter, page 281, would seem to give a colour of legality to the Subordinate Judge's procedure, and would show that he was justified in acting as he did.

That case seems to be very different from this. In that case, when the question of pauperism was inquired into, a document was put in, which showed most conclusively that the petitioner was barred by the provisions of section 2 of the Civil Procedure Code. To go on further with the matter would have been simply waste of time and money, inasmuch as the result was perfectly clear, for the case had already been decided upon the same cause of action and between the same parties. Under su circumstances, we do not say that t Subordinate Judge was wrong in acting he did.

But here the case was quite different. the Subordinate Judge is right in the acti which he has taken, the result may be absolute denial of justice to the petitioner, not being allowed to prove that he is *pauper.* If it is true that he has no mea to defray the expenses of this suit, as sworn deposition states, then to refer him a regular suit with all its concomitant expen would be, no doubt, to deny him justic I, for my own part, should, in a case of th sort, hold parties strictly to the words the law. And the Subordinate Judge deciding the question of limitation, not as was bound to do upon the examination the petitioner, but upon the examination other witnesses who were summoned for entirely different purpose, exceeded jurisdiction. Accordingly we set aside order. The result will be that the alleg pauperism will be inquired into.

Mitter, J.—I concur.

The 17th January 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt., Chi Justice,* and the Hon'ble E. G. Birc *Judge.*

Suit for Redemption.

Case No. 2754 of 1874.

Special Appeal from a decision passed the Officiating Judge of Chittagon dated the 31st July 1874, reversing decision of the First Subordinate Jud of that District, dated the 17th Nove ber 1873.

Prosunno Coomar Dutt (Defendant), *Appellant,*

versus

Chytunno Churn Bidyalunkar (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Aukhil Chunder Sen* for Appellant.

The Officiating Advocate-General for Respondent.

In a suit for redemption, which was decreed by t Lower Appellate Court, who found that the plaint (mortgagor) had paid into Court, within the year grace, a sum sufficient to cover, not only principal a interest, but all other sums due from plaintiff to defen ant (mortgagee), the High Court declined to interfe

that it was the peculiar province of the lower to go into and adjust the accounts between ties.

rth, C.J.—On considering this case, e no sufficient ground for disturbing the ment of the Court below.

the 7th of September 1871, the plaint- deed made a usufructuary mortgage rtain land to the defendant for Rs. 4,000, a condition that, if the principal sum ld not be paid within a year, the mort- should become absolute.

nder this deed the mortgagee never ed into possession of the land. The tiff continued to receive the profits; the defendant, notwithstanding this, e certain payments in respect of the for Government revenue and other- . After the expiration of the year from date of the mortgage, the defendant took eedings to obtain a foreclosure; and the ntiff, on the other hand, instituted this to redeem the mortgage; and for that pur- e deposited the principal sum of Rs. 4000, no interest. Subsequently, however, and hin the year of grace allowed by Regula- n I. of 1798, section 2, he paid into Court further sum of Rs. 1,215-3-7, which was re than sufficient to cover the whole amount imed by defendant for interest, but not ugh to cover the amount claimed by him the payments made for Government venue and otherwise. In fact, there was disputed account between them in respect several items, though the entire differ- ce did not amount to more than Rs. 40 50.

The Lower Appellate Court appears to ve gone into this account, and to have nd in the result that the sums paid by the aintiff (amounting in all to Rs. 5,245-3-7) ere sufficient to cover the entire sum due om him to the defendant, and consequently ecided that the plaintiff was entitled to a decree for redemption.

Against this decision the defendant ap- peals; and his main contention has been that the sum paid by the plaintiff is not enough; and that, if it is not enough by ever so small an amount, the defendant is entitled to foreclose; and he has urged upon us very strongly that, under Regulation I. of 1798, the plaintiff was not entitled to redeem upon payment within the year of grace of princi- pal and interest only, but of all such other sums as a Court of Equity would require him to pay, before he is entitled to his redemption.

We think, however, that, in this case, it is unnecessary to decide that question.

The plaintiff has paid into Court within the year of grace a sum which the Judge finds not only to be sufficient to cover the amount of principal and interest, but all other sums due from the plaintiff to the defendant. It was the peculiar province of the Judge to go into and adjust the accounts between the parties; and we do not doubt that he has come to a correct conclusion.

The appeal will, therefore, be dismissed with costs.

The 17th January 1876.

Present :

The Hon'ble Sir Richard Garth, *Kt., Chief Justice*, and the Hon'ble E. G. Birch, *Judge.*

Suit by Minor—Trusteeship of Guardian—Jurisdiction.

Case No. 2896 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 27th June 1874, reversing a decision of the Sudder Moonsiff of that District, dated the 23rd August 1873.

Ram Joy Mojoomdar (one of the Defendants), *Appellant,*

versus

Koomar Kedar Narain Roy (Plaintiff), *Respondent.*

Baboo Grija Sunkur Mojoomdar for Appellant.

Baboo Kishoree Mohun Roy for Respondent.

In a suit to recover, from the guardian of a minor and the manager of his property who had granted to himself, benamee, a farming lease of the minor's property, rents collected by him for which he did not account, HELD that the defendant could not be considered simply as an agent to collect plaintiff's rents, but was bound as a trustee to account for the proceeds of the property, and that the claim was, therefore, not cognizable in a Small Cause Court.

Garth, C.J.—This is a suit brought by the plaintiff to recover from the defendant

a sum of Rs. 404-7-10 under these circumstances :—

In the year 1276, while the plaintiff was a minor, and the defendant was acting as his guardian and manager of his estate, the defendant, by means of a benamee transaction, became the farmer of Mehal Chowpokhuria. Upon the minor's estate coming under the management of the Court of Wards, the validity of this farming lease was inquired into by the Collector; and the defendant admitted that he was the real farmer, and asked the Collector to let the lease be cancelled on his refunding to the minor's estate all the collections that he had made as farmer. The Collector acceded to this arrangement, and the defendant accordingly paid Rs. 226. Upon the plaintiff's obtaining majority, and causing an inquiry to be made, he found that the collections made by the defendant considerably exceeded the sum he had paid in, and the plaintiff now sues him for the amount of the sums collected but not accounted for.

The Subordinate Judge finds that plaintiff is entitled to receive Rs. 257-10 with interest from the defendant. Against this finding, this special appeal is preferred, and the ground taken in the petition of appeal is that the suit is cognizable by the Small Cause Court, and should not have been tried as a regular suit.

Another ground has also been taken here which was not taken in the Courts below. It is said that the suit is barred, inasmuch as it is a suit cognizable under section 28 of the Bengal Rent Law.

We consider that both these objections are disposed of by the finding of the Subordinate Judge; that the defendant was the guardian and manager of the plaintiff's property; and that, in that capacity, he granted to himself an ijara and collected rents for which he did not account to the plaintiff. The defendant cannot, therefore, be considered simply as an agent to collect the plaintiff's rents. He was bound as a trustee to account to the plaintiff for the proceeds of the property. It is in that character that he is to be made a defendant in this suit, and we think, therefore, that the claim could not properly have been made in the Small Cause Court.

This appeal is, therefore, dismissed with costs.

The 17th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Erroneous Valuation of Suit—Jurisdiction.

Case No. 2342 of 1874:

Special Appeal from a decision passed by the Second Subordinate Judge of Bhaugulpore, dated the 24th August 1874, modifying decision of the Sudder Moonsiff of that District, dated the 15th May 1874.

Mohee Lall and another (Plaintiffs), *Appellants,*

versus

Khetaram Marwary (Defendant), *Respondent.*

Mr. J. Younan for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondent.

The valuation of a suit must be taken from the statement in the plaint, and if, after going into the evidence it is found that a particular item is improperly claimed the Court has means of punishing the plaintiff by saddling him with costs, or in any other way; but the whole suit should not be dismissed simply because in the opinion of the Lower Appellate Court, it ought to have been valued within the limit of the jurisdiction of the Small Cause Court.

Glover, J.—This case must go back to the Subordinate Judge in order that it may be tried on the merits. It appears that the plaintiff made a claim, on account of goods sold and delivered, for Rs. 507-11-6. The first Court thought that one item of Rs. 2[illegible] was entered in the account improperly and deducting that item, gave the plaintiff a decree for the balance. Against this decision both parties appealed to the Subordinate Judge. The Subordinate Judge, holding that this item was improperly imported in the plaint for the express purpose of ousting the Court of Small Causes of its jurisdiction, dismissed the whole case. In this we think he was wrong. The valuation of the suit must be taken from the statement in the plaint, and if, after going into the evidence, it is found that a particular item was improperly claimed, the Court has means of punishing the plaintiff by saddling him with costs or in any other way. At all events it is hardly fair to dismiss the whole

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and mulct the plaintiff of the sum which Moonsiff found was rightly due to him, ly because, in the opinion of the Subor- te Judge, the suit ought to have been ed within the limit of the jurisdiction e Small Cause Court. We think, there- that the Subordinate Judge must con- r upon the evidence whether the finding e Moonsiff that the sum of Rs. 346-13-4 ue to the plaintiff is correct or not, and a fresh decision upon the case. Costs follow the result.

The 17th January 1876.

Present:

e Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Possessory Suit—Boundaries.

Case No. 2471 of 1874.

ecial Appeal from a decision passed by the Second Subordinate Judge of Mymensingh, dated the 12th August 1874, affirming a decision of the Moonsiff of Ghosegong, dated the 3rd April 1873.

Raj Chunder Bhuttacharjee and another (Plaintiffs), *Appellants*,

versus

Tripoora Debia (Defendant), *Respondent*.

Baboo Kashee Kant Sen for Appellants.

Baboo Nullit Chunder Sen for Respondent.

The lower Courts are not at liberty, in a suit for ssession of land, to refrain from coming to any judication, merely because there is some difficulty in certaining boundaries; but are bound to determine finitely whether the land belongs to the plaintiff, and to any issue of limitation.

Garth, C.J.—In this case two unfortu- ate mistakes have been made by the Lower ppellate Court, one of which appears to ave originated in the Court of first instance nd to have been confirmed by the Court of ppeal; and the only difficulty that we have ik is how we might rectify these mistakes ith the least possible expense and delay to e parties.

The suit was brought by the plaintiffs for he purpose of recovering possession of several pieces of land, numbered 1, 2, 3, 4, 5, of which they say they were dispossessed by the defendants; No. 1 the plaintiffs claim as their own separate property, and the remaining Nos., 2, 3, 4, 5, as being entitled to them jointly with the defendants.

As regards No. 1, the defendants denied the plaintiffs' title altogether; and also relied upon the statute of limitations.

The Moonsiff was, of course, bound to determine definitely upon the evidence whether this land belonged to the plaintiffs, and also the issue as to the limitation. But strange to say he has come to no decision at all. He seems to have had some difficulty in ascertaining the boundaries; and, therefore, he says that "he refrains from coming to any adjudication," and leaves all the issues relating to this land wholly undecided.

And this mistake has not been rectified by the Subordinate Judge. He also points out the discrepancies in the evidence of the witnesses as to boundaries, and says that he has no reason to find fault with the decision of the Moonsiff as to plot No. 1, which means, if it means anything, that he agrees with the Moonsiff in coming to no decision at all.

Then, as regards plot 5, defendants have admitted that they were jointly entitled with the plaintiffs, and the only issue that they have raised with regard to it is that they never dispossessed the plaintiffs; and this issue has been found in their favour by the Moonsiff. But the Lower Appellate Court has gone further. It has found, contrary to the evidence, and contrary to the distinct admissions of both parties, that the plaintiff's were never in possession, or, in other words, had never any title to this plot, whereas what he ought to have found was simply that the defendants had never dispossessed the plaintiffs of this plot.

We think that, for the purpose of rectifying these mistakes, our proper course will be to reverse the finding of the Lower Appellate Court as to plots 1 and 5; to say, that as regards plot 5, the plaintiffs were jointly entitled to the land with the defendants, but that the defendants did not dispossess the plaintiffs of it; and as regards plot 1, to refer the case back to the Moonsiff, with directions definitely to decide, and, if necessary, to try over again the issue as regards that plot.

As the Courts below, and not the parties, have been the cause of these mistakes, we think that we ought to give no costs of this appeal.

The 17th January 1876.

Present :

The Hon'ble Sir Richard Garth, *Kt., Chief Justice,* and the Hon'ble E. G. Birch, *Judge.*

Unregistered Mortgage-bond—Right of Suit—Jurisdiction.

Case No. 3214 of 1874.

Special Appeal from a decision passed by the First Subordinate Judge of Mymensingh, dated the 23rd September 1874, reversing a decision of the Moonsiff of Eshurgunge, dated the 14th August 1873.

Shibo Soonduree Debia and another (two of the Defendants), *Appellants,*

versus

Sowdaminee Debia (Plaintiff), *Respondent.*

Baboo Kashee Kant Sen for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

Where land of the value of 100 rupees or upwards was mortgaged on a bond which was not registered as it ought to have been under the Registration Act in force at the time, HELD that the bond could only be sued upon as a money-bond; and though the suit might be brought in a Court within whose jurisdiction the land was not situated, the Judge would have no right, even with the consent of the parties, to deal with it as a mortgage, or to make any decree affecting the land in dispute.

Garth, C.J.—WE think that the judgment of the Lower Appellate Court must be affirmed.

Both parties claim the land in dispute under Doorga Churn Dey Sircar, the defendant No. 3.

On the 4th Kartick 1215, it was mortgaged by Doorga Churn to Brojo Nath Missri, who obtained a decree upon that mortgage on the 21st Joisto 1277, and afterwards sold the land under the decree to the defendants.

The plaintiff purchased the same land from Doorga Churn on the 21st Srabun 1277, and the question is, whether, under these circumstances, the plaintiff's or the defendant's title is to be preferred. An objection was taken to the plaintiff's purchase upon the ground that her kobala was fraudulent and collusive; and so far as the conduct of Doorga Churn was concerned, in selling the property after he had mortgaged it to some one no doubt the transaction was a very d ditable one, but there appears to have no evidence that the plaintiff herself otherwise than perfectly *bonâ fide* in ing the purchase, and the Subordinate has found that the transaction, so far was concerned, was perfectly honest. being so, the only question remains, w the defendant's title, which undoubtedl the advantage of being prior to the plai in point of date, ought to prevail. But are two objections raised to it:—

1st.—That the mortgage which was in Kartick 1275 to Brojo Nath Missr not regis ered, as it ought to have been, section 17 of the Registration Act th force; and, *2ndly,* that the suit in whic decree was obtained being brought in a other than that in which the land was s the Court has no jurisdiction to enterta

It is argued by the defendants although the mortgage-bond was not tered, the mortgagee was entitled to sue it as a common money-bond, and to sue it as such in the Court in which the su brought; and it has been shown that, the trial of the cause, the mortgagor D Churn consented that the land in d should be charged in the decree, whic sent, it is contended, removed any di with regard to the jurisdiction of the and operated to charge the land in suc as to make it bound by, and capable of, sold under the decree.

We think, however, that this argum quite untenable. The mortgage-bo having been registered, and the value land being 100 rupees or upwards, the could not operate in any way to cha It operated and could only be sued u a common money-bond, and althoug money-bond it could be sued upon Court in which the decree was obtain Judge of the Court had no right, eve the consent of the parties, to deal with mortgage, or to make any decree in t affecting the land in dispute. That be the decree could not operate in any affect the validity of the plaintiff's pu and Doorga Churn had a perfect legally speaking, to convey the land plaintiff.

We consider, therefore, that the Sub nate Judge was quite right in upholdin plaintiff's title against that of the defendan and the appeal must consequently be d missed with costs.

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The 17th January 1876.

Present:

Hon'ble Sir Richard Garth, *Kt., Chief ustice*, and the Hon'ble E. G. Birch, *udge.*

Execution-sale—Jurisdiction.

In the matter of

Hara Dhone Shamunto, *Petitioner,*

versus

oluck Chunder Shamunto and another, *Opposite Party.*

Baboo Ashoolosh Dhur for Petitioner.

aboo Kalee Prosunno Dutt for Opposite Party.

Judge has no right to set aside a sale under a ee upon the application of a third person who is not rty to the suit, and in no way connected with the inal proceedings.

Garth, C.J.—We think that the rule uld be made absolute. This case is pre-ely similar to that of Luchmeeput Singh Hira Lall Seal, which was decided on the h of September last. When a sale has ten place under a decree, a Judge has no ht, upon the application of a third person o is not a party to the suit, and in no y connected with the original proceedings, set aside the sale. As to the so-called egularity, which it is contended that the dge had a right to take notice of judicially d to correct, we consider that a mere etext for setting aside the sale upon other ounds. In point of fact we do not see at there was any irregularity at all; but e pretext has been resorted to in order to stify a proceeding, which was clearly in cess of the Moonsiff's jurisdiction. The le will be made absolute, and the order f the Moonsiff, setting aside the sale, will e reversed. Fees, two gold mohurs, to be aid by the party showing cause against the le.

The 17th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Code of Civil Procedure, s. 246—Ostensible Purchaser—Onus Probandi.

Case No. 1100 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of East Burdwan, dated the 9th February 1875, reversing a decision of the Second Moonsiff of that District, dated the 1st October 1874.

Tulsee Monee Dassee (Plaintiff), *Appellant,*

versus

Peary Mohun Baboo (one of the Defendants), *Respondent.*

Baboo Golap Chunder Sircar for Appellant.

Baboo Doorga Ram Bose for Respondent.

In a suit to set aside an order made under the Code of Civil Procedure, s. 246, a plaintiff is bound to prove purchase and subsequent possession of the disputed property, where these are the grounds of her claim.

The objection taken by the special appellant in this case is that the Subordinate Judge has placed the onus on the wrong party, and that, under the circumstances, the onus ought to have been on the defendant, and not on the plaintiff. This is not so. The plaintiff is now seeking to set aside an order made under section 246 of the Code of Civil Procedure. It was held under that section that the property in suit was not in the possession of the plaintiff, and consequently her application was rejected. She now comes into the Civil Court, and like all other plaintiffs must prove her case, namely, that she had purchased the property at auction, and that she was in possession of it ever since her purchase. The Subordinate Judge has found upon the evidence that, although the plaintiff was the ostensible owner of the property, having the sale-certificate in her name, yet, as a matter of fact, the ownership of the property remained as before with the judgment-debtor, and that, even after this ostensible purchase by the plaintiff, the judgment-debtor himself paid

the rents. Under these circumstances, the Subordinate Judge has come to the conclusion that the plaintiff's allegation is false, and that, in reality, the purchase was a benamee purchase on behalf of the judgment-debtor. This is a question of fact, and there is no ground for interfering in special appeal.

The appeal is dismissed with costs.

The 18th January 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Admission of unstamped Documents.

Case No. 1981 of 1874.

Special Appeal from a decision passed by the Judge of Purneah, dated the 21st May 1874, reversing a decision of the Moonsiff of Sahebgunge, dated the 5th January 1874.

Roy Luchmeeput Singh Bahadoor (Plaintiff), *Appellant*,

versus

Shaikh Moshuruff Ali (Defendant), *Respondent*.

Baboo Rash Beharee Ghose for Appellant.

Moonshee Serajul Islam for Respondent.

Where a Court of first instance erroneously admits a document without stamp, the error, being one which does not affect the merits of the case as between the parties, does not constitute a proper ground for appeal.

Garth, C.J.—THE Judge has made a mistake here. The Moonsiff ought not to have admitted this document without a stamp, but having admitted it, the error which he has committed is not one which affects the merits of the case as between the parties; and the authorities which have been cited to us clearly show that such an error does not constitute a proper ground of appeal. The Judge, therefore, was wrong in reversing the decree of the Moonsiff on this ground. His decision must be reversed, and the case remanded to him for re-trial on the merits. The costs will abide the ultimate result of the trial on remand.

The 18th January 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt*, *Justice*, and the Hon'ble E. G. *Judge*.

Orders on Tenants—Unstamped Docu Evidence.

Case No. 2512 of 1874.

Special Appeal from a decision pas the Judicial Commissioner of Nagpore, dated the 19th June affirming a decision of the D Commissioner of Hazareebagh, date 17th December 1873.

Bukshee Kunnee Lall (Defendant) *Appellant*,

versus

Maharanee Thakoornath Sai (Plainti *Respondent*.

Mr. R. T. Allan for Appellant.

Baboo Mohesh Chunder Chowdhr for Respondent.

Orders upon tenants to hold themselves respon a particular person to whom a release has bee by their landlord are not documents which requires to be stamped, and ought not to be rej evidence on the ground of their not being stamp

Garth, C.J.—WE think that the Court was wrong in rejecting the docu in question on the ground of their not been stamped. These documents appea orders upon the tenants to hold them responsible to a particular person to a release had been made by their lan and we do not find that such orders under the description of any of the ments which the law required to be sta

The only evidence, which was adduc the part of the defendant to establi case consisted of these three docume some oral evidence. The Judicial Co sioner rejects the oral evidence, beca considers it to be worthless; and he the documents, because he does not t right to look into them on account o being unstamped. But, supposing h admitted these documents as evidenc taken them into consideration, it is imp for us to say what effect they would had on his mind. Under these c stances we think that the case sho back to him that he may consider th tents of these documents and decide th upon the merits. The costs will abi ultimate result.

The 27th November 1875.

Present:

mes W. Colvile, Sir Barnes Peacock, Montague E. Smith, and Sir Robert Collier.

Possession—Title.

ppeal from the High Court of Judicature at Madras.

Arumugam Chetty and others

versus

Perriyannan Servai and others.

ssession on the part of one party, which is not to have commenced in wrong, can only be dis- by distinct proof of a superior title in another

E appellants, who were the plaintiffs in action out of which this appeal has , are or represent the Nattukottay ties who belong to the Nagaram of ngudi, and have been throughout these eedings, and in this judgment will be, ed "the Nagarattars." The action was ght by them against certain persons of a ent caste who represent a community may be called, and has been called ghout the proceedings, "the Nattars." plaintiffs, the Nagarattars, form part of urban and trading population of this ict of Velangudi. The Nattars belong e rural population, and are probably rators of the soil. The object of the is to have it declared that the Nagarat- are entitled to the management of two odas, which, for all practical purposes, be treated as one pagoda, devoted to the ice of the Durga goddess, whose parti- r title is Periyanayaka. They also claim ave delivered over to them the possession those pagodas, with the appurtenances sisting of ornaments and other articles ting to the worship of this idol. The il Judge found in favour of the Nagarat- . The High Court has reversed his cree, and made a decree dismissing the t against which the present appeal is ought.

Their Lordships cannot but regret that e learned Judges of the High Court have t stated in greater detail the reasons which duced them to come to a conclusion con- ary to that which the Civil Judge had upported by a judgment, which, whether it be right or wrong, must be admitted to be one very carefully considered. The very nature of the dispute renders it peculiarly desirable that their Lordships should have all the light which the full expression of the opinions of Judges of local experience, dealing with conflicting evidence, would throw upon the case. Their Lordships, however, must deal with the case as it stands.

The case made by the Nagarattars was that these pagodas were mere dependencies of a larger pagoda dedicated to the worship of Siva, of which they are the admitted managers; that the three pagodas had been supported out of the same funds; that they, the Nagarattars, had the administration of those funds; that the worship and all the services of the pagodas were performed by servants appointed by them; and, feeling it necessary to account for a change in the possession of the pagodas, they distinctly alleged in their plaint that, "on the night of "the 28th April 1871, the defendants forced "open the doors of the said two Periya- "nayaki Amman's pagodas, and took posses- "sion of the said pagodas, and are keeping "the sacred jewels and other property which "they took therefrom." And further: "That "the defendants on that same night unlaw- "fully carried away the idol of the village, "Periyanayaki Amman, which, according to "custom, had been brought to the Kantes- "wara Mudayar pagoda for the Sivaratri "festival, and also the property mentioned "below, even before the festival was over." Then they pointedly say: "The cause of "action is the fact of the defendants having "unlawfully entered the said pagodas and "taken possession of the things therein. "It arose on the 28th April 1871."

Now it is admitted that of this forcible entry and dispossession there is no evidence whatever, and therefore that the issue which had been framed upon that allegation in the plaint would of necessity have been found against the Nagarattars. On the other hand, it may be admitted that the case made by the Nattars is not altogether consistent with the evidence taken in the cause. They seem to have asserted that these pagodas were wholly distinct from the pagoda of Siva, and in no way connected, by worship or otherwise, with it; and they suggested that certain sacrifices involving the taking of animal life, which formed part of the worship of the Durga goddess, and were not permitted in the worship of Siva, rendered it impossible, in a Hindoo point of view, that the two institutions should be so connected. The evidence, no doubt, does not support these or some of the other allegations made

by the defendants. There does seem to have been a certain community of management. It was admitted in the case that there was but one set of servants for the three pagodas up to the date of the Inam pottah of the 19th November 1869, and that up to that date all the incomes were enjoyed in common. It was admitted or, if not admitted, proved that the image of the Periyanayaki idol was occasionally taken to the pagoda of Siva, and there remained for a certain time; that the same dancing girls attended the two pagodas; that the endowment being a common one, the granaries and other things were in common; and that certain daily allowances were, at all events until the dispute culminated in a rupture, made by the Nagarattars for the daily worship of the Periyanayaki Amman. But the failure of the defendants to make out wholly the case which they have pleaded in defence will not entitle the plaintiffs, if they have failed to make out their title, to disturb the existing possession, or to succeed in this suit.

Now, if the allegation of forcible dispossession had been made out, the case of the Nagarattars would, no doubt, be an extremely strong one. It would probably have been inferred from the evidence that their possession up to the date of that forcible act had been consistent with the title which they alleged. But, since they have failed to prove the dispossession alleged, we have to deal with a possession on the part of the defendants which is not shown to have commenced in wrong, and the plaintiffs can only disturb that by proving distinctly a superior title. In the opinion of their Lordships they have failed to do so. There is, no doubt, a great deal of conflicting testimony; but the evidence on the whole, as to the ceremonies and the like, support several of the short observations which the learned Judges of the High Court have made in support of their decree. It certainly appears that the Nattars have been allowed precedence and peculiar honors in some ceremonies and points of worship; it also appears that they have exercised some control over the transfer of the image and other matters into which their Lordships do not think it necessary to go at length. One very important circumstance is that the custodian of the jewels of this idol, which appear to be of very considerable value, is admitted to be a Nattar who is described as the hereditary jeweller of the village. His ancestors, therefore, may be inferred to have had the possession of these jewels which the Civil Judge has by his de preserved to him. The cars and all were necessary for the movement of the are also found to have always been in custody of the Nattars.

Upon the question of possession, Mayne, abandoning the forcible dispossess alleged by the plaint, has fallen back a dispossession supposed to be conseq upon the delivery out of the pottah of 1 This brings us to the consideration of which is the most important piece of dence in the cause, namely, the proceedi of the Inam Commission, which are set at page 74*a* and the following pages. O if not the principal, object of that Comm sion appears to have been to ascertain w lands had been effectually made subject religious trusts, and, as such, had beco either rent-free, or subject only to a s and fixed quit-rent. The inquiry seems have been conducted locally, under authority of the Inam Commissioner, by Deputy Collectors of the different distri and to have been carried on from village village. It seems to their Lordships cle to result from the Exhibit No. 90T page 74*a* and the three following pages of record, that the dispute as to the rights the Nattars in these pagodas cannot h dated, as Mr. Mayne contends, from delivery out of the pottah in 1869, beca the proceedings to which those docume relate certainly took place in 1863. N what is the effect of those document Those at pages 74*b* and 74*c* relate to villages Pandiranendal and Ayakaranend which form part of what may be called common endowments of the pagodas, each gives the result of the inquiry of Commission, touching the particular villa to which it relates. In each the village question is described as a davastan village in the zemindaree of Sivagang It says: "This was granted for the maint "nance of the temple of Stri Khandesw "Swami in Velangudi; this is a perman "grant. No pottah." From this it may b inferred that the original grant of the land was made by some ancient zemindar Sivagangai. But there is no evidence of th date or of the terms of the grant. Eac document says: "The temple is eff ciently kept up." In each there afterwards a more particular statement of the trusts to which the proceeds of the village are applicable. In that relating to Pandiranendal it is said: "The proceeds "of the village are appropriated for the

b

le of Stri Khandeswara Swami, and Nattukovil of Periyanayaki Amman." latter are the temples in dispute. ugh the name of the goddess is not red in the accounts of Fusli 1211 and 3, in the zemindar's account of Fusli 2 it is entered. Hence the village ngs to Nagara Kovil of Khandeswara mi and Nattukovil of Periyanayaki man; these two temples are under the agement of the trustees in column since long." The corresponding note the other village is in greater detail, makes it still more clear that there was a distinct allegation, acquiesced in by Collector, that the pagoda of the goddess ged to the Nattars: "The proceeds this village are appropriated for the use the temple of Khandeswara Swami, ich belongs to Nagarattar or Nattu- ay Chetties, and to the temple of Pe- anayaki Amman, which belongs to ttar." Again it appears that the ons originally treated as the trustees of property were only the two Chetties e names are entered in the 16th and columns. But, before the record was ly made up, the names of three Nattars e added; and that this was done upon representation of the Nattars insisting n some record of their rights is itted even by the Civil Judge in the lanation which he gives of the circum- ce. That the addition was subsequent the first draft of the document appears n the note in the 20th column, which is ed June 1864; whereas the date of the ceding note is December 1863, or six nths earlier. Their Lordships cannot mit the explanation of the alteration which suggested by the Civil Judge, if by it he ans to suggest that the alteration was ade in consequence of some tumultuous presentations of the Nattars, amounting to ercion. It may be true that a mob of ttars tumultuously desired that the three ttars should be registered as trustees. t their claim, though, in the first instance, multuously asserted, was obviously under nsideration for a considerable time, and as finally confirmed by the Officiating Inam Commissioner on the 22nd of December 1864. These proceedings cannot have been had nder pressure on the part of a mob; and it must be presumed that the authorities came advisedly to the conclusion that the claim was a just one.

This view is in some degree confirmed by what was done also in 1863 with regard to the small portion of land which was afterwards the subject of the pottah of 1869. The document at page 74*a* of the record treats the proceeds of that land as exclusively devoted to the support of the pagoda of Periyanayaki. The Inam ticket was not given, as in the other case, to the Nagarattars. They were not entered as trustees in the column of trustees; and though, on the other hand, no Nattar is entered, the ticket was made over to the gurukhal. He was treated as the worshipper entitled to the ticket. A distinction was therefore made, which would hardly have been made if the three pagodas had been really and undisputedly part of the same institution, and subject to the same management.

It was said that, notwithstanding these proceedings, everything went on as before: that the proceeds of the endowments were received by the Nagarattars; and that there was no dispute until the pottah of 1869 was issued, and, in conformity with the document at page 74*a*, was given out to the gurukhal, from whom it passed to the principal of the Nattars. It is suggested that this gurukhal played his employers, the Nagarattars, false, and made an improper transfer. But there is nothing to show that he was not right in so dealing with the pottah. It is perfectly clear that the pagoda had been described as a Nattar pagoda, and that the Nattars were, as early as 1863, claiming some rights of management in it, or they would never have been entered in the documents relating to the common endowments as trustees. This particular parcel of land belonged exclusively to the pagoda of Periyanayaki Amman. The Nagarattars had ostensibly no concern with it. Again, the pottah which was granted of the other villages is not produced, and it is not satisfactorily accounted for. It is perfectly consistent with probability, and must be presumed, in the absence of any evidence to the contrary, that this pottah was in conformity with the records of the Inam Commission, and was a grant of these villages to the Nattars as well as the Nagarattars as trustees. The superior habits of business and life of the Chetties may account for their continuing to receive the profits of, and generally manage, the common endowment; but that is not a circumstance which establishes their right to recover the possession of these pagodas from the Nattars, who, as far as their Lordships can see on the evidence, have always, to some extent, been in possession. Certain it is that the dispossession of the Nagarattars, or the first claim of

possession on the part of the Nattars, cannot be said to date only from the grant of that pottah, because it is proved in the cause that, as early as 1867, the Nattars were resisting the removal of this image, when the Nagarattars wished to have it removed to the temple of Siva; and must, therefore, at that time at least, have been asserting dominion over the image in opposition to the Nagarattars.

Of the original foundation of the Siva temple, beyond what is to be gathered from the proceedings of the Inam Commission, there is no trace. One contention of the appellants was that, wherever there is a temple devoted to Siva, there will be found a dependent temple devoted to the worship of some Durga goddess in its vicinity. It is, however, established that this state of things is universal, and it may well have happened that these temples may have been established by the Nattars or the Nattar community taking advantage of the vicinage of a Siva temple, and giving the managers of that temple the benefit of the new foundation. The inscription, which might have shown who was the founder of the pagodas in dispute, is unfortunately defaced in an important word. Again, it may have been arranged by the zemindar for the time being of Sivagangai that part of his endowment of the Siva temple should go to the sustentation of the other temples, though founded by the Nattars. That is perfectly consistent with the theory that some right of possession and management is in the Nattars.

Upon the whole their Lordships are of opinion that the explanation which has been given by the Civil Judge of the proceedings of the Inam Commission, and of the addition made to them in favour of the Nattars, is unsatisfactory; that those documents turn the scale of the conflicting evidence, and that certainly the Nagarattars have not made out their right to disturb the possession which now exists. The necessary consequence of this is that the suit, as framed, is improper, and that the decree of the High Court is correct.

It has been alleged by Mr. Mayne that a decision to this effect leaves the parties in an unsatisfactory position. And this, no doubt, may be true. It may happen that, either by reason of the refusal of the Nagarattars to apply the funds in their hands to the sustentation of the smaller pagodas while they are in the possession of the Nattars, or from some other cause, fresh difficulties and disputes may arise. It is much to be hoped that, if this should be the case, the p will contrive to have their differences d mined by a native panchayat, a tribunal p liarly adapted to determine disputes of kind, which necessarily involve many considerations founded on Hindoo Hindoo ritual, Hindoo belief, and Hi feeling. But, even if the parties have to come to the Courts, they must so co a suit properly framed for the purpose having their disputes settled by what should call a scheme for the administra of the endowment. Dealing with this as it stands, their Lordships can but ad Her Majesty to affirm the decree of High Court, and to dismiss this appeal costs.

The 17th December 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacoc and Sir Montague E. Smith.

Bond—Presumptions—Mortgage-bond—Limitation—Act XIV. of 1859, s. 1, cl. 12.

*On Appeal from the High Court of J cature at Fort William in Bengal.**

Juneswar Dass

versus

Mahabeer Singh and others.

In the absence of satisfactory proof of fraud or mi take, every presumption ought to be made in fav of statements contained in a bond which was delib ately entered into, and which has been acted upon many years.

In an action brought upon a mortgage-bond wh combines a personal obligation with the pledge of p perty, where the claim is founded, not upon the cont to pay the money, but upon the hypothecation of t land, and the object is to obtain a sale thereof against purchasers under a subsequent mortgage-bo the law of limitation applicable to the suit is Act XI of 1859, s. 1, cl. 12.

THIS was an action on a security comm in Bengal, called a mortgage-bond, which appears to combine in one instrument tw things, a personal obligation by the make of the bond to pay the money, and a mortgage of property by way of pledge and security. The bond in question is dated the 21st June 1856, and was given by Baboo Ritbhunjun Singh, who is the defendant No. 1 in the suit, to Mussamut Agur Koonwar. The consideration for the bond consists

* From the judgment of Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*, decided on the 21st May 1873.

amounts which are stated to have due under five previous bonds given Mussamut by Baboo Dyal Singh, ther of Ritbhunjun Singh. The bond the former bonds, and proceeds thus: ce, I, the declarant, do of my own rd and consent make myself respon- for the sums of money covered by of the five above-named bonds, prin- l with interest, as well as other loans, in all for Company's Rs. 16,511, bind myself for the payment of the said of money to the above said lady." part of the bond contains a personal ation on the part of the maker of the , the defendant No. 1, to pay the money. are inserted the terms of the loan: th the consent of both parties it has en agreed upon that the interest should paid as per detail given below, that the principal with interest I will pay at the e of eight annas per cent. from the date the execution of this bond to the end Jeyt 1269 F.S., and from 1270 F.S. Jeyt 1274 F.S. at the rate of Re. 1 cent. per mensem. Accordingly I reby declare and give in writing that I ll positively, without any objection what- er, liquidate the said sum of money, incipal with interest, in the month of yt 1274 F.S., to the aforesaid lady." far, therefore, as we have hitherto gone he bond, the ultimate period for payment ld not accrue until Jeyt 1274. Now es the part of the instrument which es an hypothecation of land: "For e satisfaction of the lady, and as security r the above sums of money, I pledge d mortgage Mouzahs Dhunpookhra and hooara, original with dependencies apper- ining to Talooka Athur, Pergunnah hojepore, held and possessed by me. I nd my heirs shall not, as long as the hole amount aforesaid remains unpaid, ransfer them in any way." Then there a clause to this effect: "Should the ouzahs mortgaged be sold in execution f decree or for arrears of revenue, the said lady shall in that case be at liberty, with- out waiting for the expiration of the term of payment, to institute a regular suit, and to sell the moveable and immoveable proper- ties of me, the declarant, and my heirs, and thereby realise the amount in ques- tion. This bond was registered on the 23rd June 1865."

The action is brought by Bhedi Singh and welve other persons, who are the heirs of the Mussamut, the fourteenth plaintiff being a person called Turmundul Dass, who had purchased a fourth share in the bond. The defendants in the suit are, *first*, Ritbhunjun Singh, described in the heading of the suit as "the principal contractor of the loan;" and, *secondly*, certain persons who are described in the same heading as "auction-purchasers of the pledged property;" and it may here be stated that they became such purchasers under a decree obtained upon another mortgage-bond made by Ritbhunjun Singh subsequently to the bond in question, and of course subject to it. The date of the auction-sale, which is sought to be impeached, is the 18th May 1865.

After the discussion which has taken place at the bar, there remain only two questions to be decided. The first is purely a question of fact which was raised in the following issue, the third issue: "Whether or not "the mortgagor has received the consider- "ation-money?" It has been contended by Mr. Arathoon that the consideration stated in the bond is not truly stated. The principal amounts of the five bonds enumerated in the bond in question are not disputed, but it is said that an amount of interest equal to the aggregate amount of the principal sums—the principal being Rs. 8,000, and the interest Rs. 8,000 also—found its way into the bond by some fraud or error; and that in point of fact that interest was not due, but had been previously paid. Both Courts below went very fully into the evidence given on that issue, and came to the concurrent finding that the defendant has failed to establish it. Having executed this bond, the onus is upon him to show that the consideration had not passed. Both Courts have come to the conclusion that he has failed to support that burden, and that he has shown no sufficient ground for the conclusion that that interest was not due. It is said that calculating only simple interest on the bond, the Rs. 8,000 could not be made up; but the High Court make a suggestion, which their Lordships regard as a reasonable supposition, that the parties, before entering into the new bond, may have come to an arrangement that rests should be made in the account, and compound interest paid. In the absence of satisfactory proof of fraud or mistake, every presumption in favour of the statements contained in the bond ought to be made, considering that it was deliberately entered into, and that for many years it has been acted upon, and payments made under it. Their Lordships, therefore, see no reason to be dissatis-

fied with the conclusion to which the Courts below have come upon the issue of fact, and the appeal, so far as that issue is concerned, fails.

The other question arises upon the period of limitation which is applicable to this case. As already observed, the instrument contains two distinct things—the obligation to pay the money, which binds the maker of it only, and the mortgage of the land; and the plaint in the present suit is properly framed upon the instrument in that aspect. It seeks to charge the first defendant, the maker of the bond, Ritbhunjun Singh, personally, and it also claims to recover the amount of the principal and interest by the sale of the mouzahs (naming them), which were the hypothecated property included in the mortgage. It is contended for the appellant that the limitation contained in clause 16, section 1 of Act XIV. of 1859, is the proper limitation to apply to the case. That is a sweeping clause, which provides thus: "That to all suits in which no other "limitation is hereby expressly provided, "a period of six years from the time the "cause of action arose." It is said that this is a suit brought to recover money lent, and the interest on that money, and that it falls within clause 16, because, although clause 10 applies to suits for money lent, it does not apply to them in the cases where the instrument shall have been registered within six months from the date, and this bond, having been so registered, is not within that section, and, not being otherwise provided for, falls within the limitation of six years in clause 16. Their Lordships, however, are clearly of opinion that neither of these clauses is applicable to this suit, which is brought in substance for the recovery of immoveable property, or of an interest in immoveable property, and falls therefore within clause 12 of the first section. The object of the suit is to obtain a sale of the land as against the defendants grouped as defendants No. 2 and No. 3, who had become purchasers under a subsequent mortgage-bond. It is therefore, as against them, a claim founded, not upon the contract to pay the money, but upon the hypothecation of the land. Their Lordships would have been disposed so to apply the Statute of Limitations if the matter had been *res integra*, but it appears from the cases to which they have been referred by Mr. Cave that there has been a long and almost uniform current of decisions in the two provinces of Bengal and Madras, giving this construction to the Act. Their L ships must not be supposed, in comin this decision, to give any countenanc the argument of Mr. Arathoon that suit would have been barred if the limit of six years under clause 16 had been a cable to it. They think, upon the constru of this bond, there would be good reason holding that the cause of action arose wi six years before the commencement of suit. However, it is sufficient to say their Lordships think the limitation ap cable to the case is that under clause section 1 of the Limitation Act.

In the result, their Lordships will hum advise Her Majesty to affirm the deci of the High Court, and to dismiss appeal with costs.

The 20th December 1875.

Present:

The Hon'ble F. B. Kemp and E. G. Bir *Judges.*

Act XI. of 1859, s. 37—Sale for Arrears of Revenue—Purchaser's Rights.

Case No. 16 of 1875.

Special Appeal from a decision passed the Judge of Mymensingh, dated 28th September 1874, affirming a de sion of the Subordinate Judge of th District, dated the 29th November 1873.

Gholam Mukhdoom (Plaintiff), *Appellant*

versus

Ashuck Jan Bibee and others (Defendants) *Respondents.*

Baboo Ashootosh Dhur for Appellant.

Moonshee Mahomed Yusuf for Respondents.

The Government having sold its zemindaree rights in certain talooks after a proclamation that the purchaser would be bound to abide by the settlements entered into by it with the dependent talookdars, one

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ooks, a mehal, J C B, was purchased with this n by M, who then sued without success to proprietor of the said talook. After this M efaulted in the payment of the Government the mehal was sold for arrears under Act XI. and purchased by G:

that G was in a very different position from M d purchased the zemindaree rights of the ent), and was not bound by the terms of the ent proclamation, but was, as his sale-certi- owed, the purchaser of an entire estate separate- ded on the Collector's rent-roll.

p, J.—THE plaintiff is the special ant. He sues, alleging that he is the n-purchaser, at a sale for arrears of nment revenue, of a mehal, by name nt Chur Protab, bearing No. 6506 on rjee of the Mymensingh Collectorate. sale took place on the 2nd September

appears that the plaintiff was put into ssion under the provisions of section 29, XI. of 1859, by the Nazir's peon. The iff alleges that, on attempting to collect direct from the ryots, he was opposed e defendant No. 1, who alleged herself a dependent talookdar; that the plaintiff the defendant No. 2 for rent; but, on ntervention of defendant No. 1, the suit dismissed. That, as auction-purchaser e mehal, the subject of suit, at a sale for rs of Government revenue, the plaintiff acquired the purchased estate free of all mbrances—section 37, Act XI. of 1859.

e defendant No. 1 Ashuck Jan Bibee's en statement is briefly to this effect: the suit is overvalued; that it is barred the provisions of section 2, Act VIII. 859, inasmuch as the suit of the former rietor for direct possession of the mehal, subject-matter of the present suit, had n dismissed; that the present suit is ght by the late defaulting proprietor, inuddin, in the benamee of the plaintiff; the plaintiff, admitting him to be the d-fide purchaser, is not entitled to khas ession; that the mehal No. 6506 on the rjee was separated from the parent zemin- ee of Zyenshaye in 1863, and the jumma s then fixed at Rs. 26-13, consequently the kmee right of the defendant, which existed 1863 and *before* the decennial settlement, not be set aside. The defendant further ges that she is in possession under a a from her husband Moulvie Kullim- lla, with whom a settlement of the talook in question was made by the Government.

The Subordinate Judge raised the following issues:—

In bar.

1. Is section 2, Act VIII. of 1859, applicable to this case?

2. Is the action in the name of the plaintiff fictitious?

On the merits.

1. Can the plaintiff resume the talook, and hold it in khas possession?

2. At what rate is the wassilat to be awarded?

On the first issue in bar, the Subordinate Judge held that, as the plaintiff was not a party to the former suit, No. 75 of 1866, preferred by Moulvie Moinuddin against the defendant No. 1 in this suit, the trial of the present suit is not barred.

With reference to the second issue in bar, the Subordinate Judge was of opinion that the plaintiff is not the *bonâ-fide* purchaser of the disputed mehal, but that he purchased benamee for the late defaulting proprietor, Moulvie Moinuddin, and that this is sufficient for the dismissal of the suit; but the Subordinate Judge goes into the merits and finds that, assuming the plaintiff to be a *bonâ-fide* purchaser, he has "acquired the talook free of all incumbrances created by the defaulting talookdar, Moinuddin;" but says the Subordinate Judge: "The talook was not created by Moinuddin—it existed when the Government held the zemindaree khas, and the zemindaree was sold with the reservation of the rights of the talookdars." The plaintiff, therefore, even assuming his purchase to be *bonâ fide*, cannot oust the defendant. The suit was dismissed on the second issue in bar and first issue on the merits.

On appeal the District Judge has affirmed this decision. After reciting in great detail the pleadings of the parties and the issues fixed by the first Court, the Judge observes, that "the question whether the plaintiff is a *bonâ-fide* purchaser or a benamee purchaser, for the defaulting proprietor is subordinate to that of the rights of the defendant under the proclamation of the Government when the zemindaree was sold."

The substantial question to be decided, observes the Judge, is "whether the rights of the defendant No. 1 were protected at

the auction-sale under clause 2, section 37, Act XI. of 1859." The Judge finds that "the zemindaree within which the defendant's talook exists was permanently settled in 1863, and that the rights of the defendant were expressly reserved by the Government proclamation." The talook of the defendant being protected under clause 2, section 37, Act XI. of 1859, the plaintiff has no right to eject the defendant. The appeal of the plaintiff was dismissed with costs.

In special appeal the main grounds are:—

1st.—That the plaintiff, being an auction-purchaser of an entire mehal sold for arrears of revenue, is entitled under the law to annul and avoid the talook set up by the defendants, which is not protected by clause 2, section 37, Act XI. of 1859, as held by the Judge.

2nd.—That the onus of proving that the tenure in question existed at the time of the permanent settlement was upon the defendant; that the Judge should have raised an issue upon this point, and decided the case on the evidence adduced by the defendant.

3rd.—That the reservation of the rights of under-tenants, if any, by Government proclamation during the settlement of 1863, did not affect the rights of the plaintiff who is an auction-purchaser for arrears of revenue.

4th.—That it was incumbent upon the defendant to establish the validity and extent of her title; the Judge was wrong in decreeing the claim of the defendant without any evidence to that effect.

It appears from the record that, on the 16th March 1836, the Government purchased a 7 annas 5¼ gundas share of Pergunnah Zyenshaye in the District of Mymensingh. After the purchase, the Government officers made inquiries into the claims of the dependent talookdars of that pergunnah, and entered into temporary settlements with them. It appears that two such settlements were made with the then proprietors of a talook called Jeenut Chand Beebee, which is the property, the subject of this suit. The first settlement was for a term from 1248 B.S. to 1257; the second for a term from 1260 to 1269; the jumma payable by the talookdars under both these settlements being Rs. 26-13. We have not been shown how the talook was held during the interim of the expiration of the first settlement in 1257 B.S. and the commencement of the second settlement in 1260, th to say, whether the Government re the khas management of the parent gunnah collecting direct from the ryo respected the temporary settlement, collected according to its terms.

On the 2nd September 1863, the Go ment, after ascertaining by local inquir assets of the component talooks o zemindaree, sold their zemindaree rig those talooks. At the time of sale, a clamation was issued that the purcha any of those talooks would be boun abide by the settlements entered into b Government with the dependent talook Amongst the talooks sold with this re tion was talook or Mehal Jeenut C Beebee, which was purchased by Moinu After his purchase, Moinuddin sued Ku oolla, the husband of the defendant N Ashuck Jan Bibee, who was then the prietor of the said talook, to eject him. suit was dismissed on the 27th August

Moinuddin probably finding that he to pay Rs. 26-13 to Government wi receiving anything beyond that sum his purchased estate defaulted in the ment of the Government revenue, the was sold for arrears of Government re under the provisions of Act XI. of and was purchased by the plaintiff on 2nd September 1869 for Rs. 715. his purchase the plaintiff sued the ten for rent; but, on the intervention of defendant, who, it is alleged, derives title from Kullimoolla under a heba, suit was dismissed.

It appears to me that the Judge taken an erroneous view of the law a cable to this case. The sale-certificate the plaintiff shows that he has purch Mehal Jeenut Chand Beebee, which separately registered as a distinct and e estate on the towjee of the Mymensi Collectorate. The sale was for arrear revenue, and the mehal passed by the It was not the zemindaree title of Government which was sold in 1869 w the plaintiff purchased, but a distinct to mehal for its own arrears of revenue, as the sale was held under the provisions Act XI. of 1859, the plaintiff has, in opinion, as purchaser of an entire est in a permanently settled district Bengal sold under the said Act for t recovery of arrears due on account of th same, acquired such estate free of all incumbrances which may have been imposed

it after the time of settlement, and is d to avoid and annul all under-tenures, rthwith to eject all under-tenants with n exceptions.

e Judge seems to think that the plaint- nds in the same position as Moinuddin, purchased the Government zemindaree in this talook in 1863, and took the subject to the reservations imposed by Government in their proclamation, *viz.*, the purchaser should be bound by the of the temporary settlements entered by Government as zemindar of the t estate with the dependent talookdars. plaintiff is in a very different position; the purchaser, not of the zemindaree s of the Government, but of the mehal as an entire estate separately recorded the Collector's rent-roll. Therefore, gh Moinuddin may have been bound by erms of the Government proclamation, hasing as he did simply the zemindaree ts of the Government subject to the rvations stated in that proclamation, the tiff is not bound by the terms of that lamation.

t is for the defendant to establish when talook or tenure was created, and that a tenure "existing at the time of the lement, that is to say, the permanent lement, either at a fixed rent from the e of such settlement or not at a fixed ." If he can do this, he is not liable ejectment, though the rent of his holding y be liable to enhancement in the event his failing to establish that he has held tenure at a fixed rent from the time of permanent settlement.

There is nothing on the record to show en the permanent settlement was made. therefore think that the case must be nded. The Judge must try first whe- r the plaintiff is the *bonâ-fide* purchaser the mehal in dispute or the benamdar the late defaulting proprietor Moinuddin, point which the Judge has omitted to , although it was raised before the first urt, the Subordinate Judge, and tried him; and then, if necessary, whether the fendant has brought himself under any the exceptions mentioned in section 37, ct XI. of 1859, so as to protect himself from ectment at the suit of the plaintiff.

Costs to follow the result.

Birch, J.—I concur.

The 6th January 1876.

Present:

The Hon'ble G. G. Morris, *Judge.*

Ryots—Right of Occupancy—Abatement of Rent.

Case No. 2263 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 17th June 1874, reversing a decision of the Moonsiff of Shahzadpore, dated the 12th July 1873.

Purtab Chunder Banerjee (Defendant), *Appellant,*

versus

Omur Sirdar (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose, Sreenath Banerjee, and *Kishorey Mohun Roy* for Appellant.

Moonshee Serajul Islam for Respondent.

A ryot not having a right of occupancy cannot be permitted to force the landlord to reduce his rates of rent when the land continues in the same condition as before, simply because other non-occupancy ryots hold on more advantageous terms than himself.

Whether a ryot has, or has not, a right of occupancy, he can claim abatement only in cases in which the value of the tenancy has diminished from causes beyond his control.

THIS was a suit for abatement of rent, on the ground that the land which plaintiff held was land of a description for which ryots of the same class, and with similar advantages in the vicinity, paid less than himself.

The first Court found that the plaintiff was not a ryot possessing a right of occupancy, and therefore dismissed his suit.

The Judge, on appeal, held that it was not necessary to decide whether the plaintiff was a ryot with a right of occupancy.

He says: "Even supposing for the sake of "argument that he is not a ryot with a right "of occupancy, still he has a right to bring "a suit for abatement of rent, alleging any "fair and equitable ground for such abate- "ment."

He then proceeds: "Then as to what is an "equitable ground of reduction, I may reason- "ably hold that, unless a defendant-landlord "establishes some special ground to the "contrary, any of the grounds mentioned "in section 18 of the Act are applicable; "increase of rent demandable from ryots "who have a right of occupancy will be "(as well as other grounds) equitable as "regards abatement claimed by ryots, whe-

"ther non-occupancy or occupancy. So, "whether the plaintiff be an occupancy or "non-occupancy ryot (a point which, as before "said, is not determined in the present "suit), the ground of abatement put forward "will be a good ground if properly estab-"lished in evidence."

He found that this was established in evidence, and he accordingly gave a decree in favour of the plaintiff. Against this decree, the present appeal is preferred. It is contended that neither in law nor in equity can plaintiff claim abatement on the ground alleged.

A ruling of a Division Bench of this Court supports this contention. The case is reported in 21 Weekly Reporter, p. 404,* and Mr. Justice Glover in his judgment says that a claim of this kind is not sustainable under the Rent Law: "A ryot "has not got the privilege of suing for "abatement, simply because the lands which "he holds may be rated higher than those "of the same description and with similar "advantages held by ryots of the same class "in the vicinity."

But, even if it be conceded that a ryot not having a right of occupancy can sue for abatement of rent on grounds other than those described is section 19 of Act VIII. (B. C.) of 1869, it appears to me that the ground advanced for abatement in the present suit is not a just and equitable ground.

For the three years prior to 1279, the plaintiff has been found by a decree of Court to be holding the land, and to be liable to pay rent for it at the rate of Rs. 16-8. This rate he wishes now to reduce to Rs. 5-10 by assimilating it to the rate paid by other ryots holding a position similar to his own. But it is obvious that the plaintiff, if he is, as the first Court has found him, a ryot not having a right of occupancy, cannot be permitted to force the landlord to reduce his rates when the land continues in the same condition as before, simply because other non-occupancy ryots hold on more advantageous terms than himself. He has consented to hold the land on certain terms, and must, therefore, abide by those terms or relinquish the tenancy. Even in the case of ryots having a right of occupancy, it is remarkable that the ground of abatement claimed in this suit is not mentioned in the Act as one of the grounds on which abatement is allowed. In section 18, three grounds for enhancement of rent are given. In section 19, the last two of these grounds, with the conditions reversed, given as grounds for abatement. The omission, therefore, of the first ground of enhancement, with the conditions reversed, seems to have been intentional. It was never intended that a ryot should claim abatement of rent, simply because, after having contracted to pay a certain rate, he discovers that he has made a worse bargain than some of his neighbours. The principle affirmed appears to be that abatement can be claimed only in cases in which the value of the tenancy has diminished from causes entirely beyond the control of the ryot.

In this view, whatever be the position of the plaintiff, whether he be a ryot with a right of occupancy or not, and on this point no determination is arrived at, the claim of the plaintiff fails, and the suit must be dismissed with costs.

* Babur Mundul vs. Shib Koomaree Burmonee.

The 13th January 1876.

Present:

The Hon'ble Louis S. Jackson and W. McDonell, *Judges.*

Auction-purchaser—Occupant Ryots.

Case No. 505 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 3rd December 1874, affirming a decision of the Sudder Moonsiff of the District, dated the 31st March 1874.

Chytun Kristo Biswas (Plaintiff), *Appellant*

versus

Juggurnath Bysack and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. Trevelyan and *Baboos Hem Chunder Banerjee* and *Huree Mohun Chuckerbutty* for Respondents.

A dur-putneedar under an auction-purchaser suing for possession is entitled to get rid of the occupancy defendants occupying the land, unless the latter can show that they come within the privileged class.

Jackson, J.—It appears to us that the judgment of the Lower Appellate Court does not sufficiently dispose of the case. The plaintiff sued as dur-putneedar under an auction-purchaser to get possession of a piece of land in the defendant's occupancy. The defendant had a double defence, partly that

a lakhiraj title to the land, and also had a miras pottah, and that under ttah he had erected a permanent build- this land. The Moonsiff found there lakhiraj, but found that there was a and that a permanent building had been thereunder. On appeal, the Subordi- Judge found nothing as to the alleged aj; but on the plaintiff's appeal he held he plaintiff must fail, because whether efendant's plea was made out or not not be inquired into in that the suit ot expressly framed for the purpose of g rid of the defendant's lease. It ra to us that this view of the Subordi- Judge is mistaken. The plaintiff ing by right of auction-purchase was ed to get rid of the defendant's occu- y, unless the defendant could show that me within the privileged class. This t has not been inquired into, and the must, therefore, go down to the Lower ellate Court in order that the defendant's may be fully inquired into. The costs is appeal will follow the result.

The 14th January 1876.

Present:

e Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

cipal and Agent—Personal Liability—Contract—Consideration.

rence to the High Court by the Judge f the Small Cause Court at Berham- ore, dated the 8th December 1875.

Kalee Mohun Sircar, *Plaintiff,*

versus

Imaun Kadar Mahomed Ali Mirza *alias* Amir Saheb and another, *Defendants.*

boos Bhowanee Churn Dutt and *Umbika Churn Bose* for Plaintiff.

No one for Defendants.

n a suit for the recovery of the value of certain icles sold and delivered to defendant No. 1, who had en an order for payment, which defendant No. 2, his agent, had accepted by an endorsement, plaintiff e up the claim against defendant No. 1, and demand- the amount from defendant No. 2 alone:

HELD that, under the circumstances, there could be claim against defendant No. 2.

Case.—THIS is a suit for the recovery of s. 498, being the value of certain arti- les sold and delivered to defendant No. 1. efend nt No. 2 is the Superintendent of Mehal Gupinathpore, belonging to defendant No. 1; defendant No. 1 had given two receipts to plaintiff for the money, one for Rs. 451, and the other for Rs. 47. On the 17th Falgoon 1281 B. S. he wrote the following order upon defendant No. 2:—

"To CHUNDRA SEKAR GHOSAL,

"*Supdt. of Pergunnah Gupinathpore.*

"Receipt dated 22nd December last for Rs. 451, and receipt dated 21st January last for Rs. 47, aggregating to Rs. 498. You are to pay within fifteen days from date to Baboo Kalee Mohun Sircar.

"Signed in Persian by defendant No. 1."

Defendant No. 2 on its back accepted the order in the following terms: "The sum mentioned in the perwanna I will pay within fifteen days from this date.

(Sd.) CHUNDRA SEKAR GHOSAL,

Superintendent."

At a certain stage of the case, plaintiff gave up his claim against defendant No. 1, and demanded the amount from defendant No. 2 alone.

The defence set up by defendant No. 2 is that he is not liable—

1st.—Because there is no consideration on his part to support the promise.

2ndly.—Because the order having been accepted by him as the Superintendent of defendant No. 1, and, as such, as his agent, he cannot be held personally liable.

With respect to the first point, "consideration" has been thus defined in the Indian Contract Act which admittedly governs the present case: "When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, something, such act or abstinence or promise is called a consideration for the promise." Here there is nothing to show that defendant No. 2 desired the plaintiff to do or abstain from doing any thing. No suggestion was made, much less any evidence adduced, to show that any request emanated from defendant No. 2.

A request may be either express or implied. Under the present circumstances of the case, a request from defendant No. 1 may be implied, but none from defendant No. 2. A prejudice to the promisee incurred *at the request* of the promisor may be a consideration as well as a benefit to the promisor proceeding from the promisee; but, in the present case, there was no request from the defendant No. 2 to the plaintiff to suffer any prejudice, nor any benefit done to defendant No. 2 personally by plaintiff or any one on

his behalf. There is, therefore, clearly a want of consideration to support the promise.

Section 25 of the Indian Contract Act says that an agreement made without consideration is void, unless (1) it is expressed in writing and registered under the law for the time being in force for the registration of assurances, and is made on account of natural love and affection between the parties standing in a near relation to each other; or unless (2) it is a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do; or unless (3) it is a promise made in writing and signed by the person to be charged therewith or by his agent generally or specially authorized in that behalf to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract.

In the present case, there can be no question that the first clause cannot at all apply, for the agreement, though in writing, is not a registered one, and was not admittedly made on account of natural love and affection.

The second clause, too, can have no application to the circumstances of this case, for there is no suggestion here that any thing was done by plaintiff for the benefit of the defendant No. 2.

With regard to the third clause, it is to be observed that it cannot be pretended that, before the acceptance of the order by defendant No. 2, there was at any time any obligation on his part to pay any portion of the present debt.

There can be no question that, under this section, the agreement would not be void as against defendant No. 1 on the ground of absence of consideration to support it. But, as plaintiff has given up his claim against defendant No. 1, I have simply to see whether there is any case against defendant No. 2. From what I have stated above, it appears to me quite clear that the agreement is void as against defendant No. 2 personally.

With regard to the second point I have very little to say. It will appear from the roka itself and the acceptance on its reverse that the former was addressed by defendant No. 1 to defendant No. 2, not in his individual capacity, but simply as his Superintendent, and it was in that capacity that the acceptance was made. He therefore accepted the order as a servant of defendant No. 1, not in his own private capacity. In matter he behaved himself simply as agent of defendant No. 1, and not as a pr pal, and did not agree to take any per liability on himself. Under such circ stances, the general provisions of sec 230 of the Indian Contract Act will ap it being clear that the case cannot fall wi any one of the three exceptional cases m tioned therein.

On both these grounds, the suit would my opinion, fail. But, as I am not with doubts, I would solicit their Lordships' o nion on the points. The case is dismi contingent on the opinion of the Honor Court.

The judgment of the High Court was delivered as follows by—

Jackson, J.—It appears to us that, un the circumstances, there could be no dec against defendant No. 2.

The 19th January 1876.

Present:

The Hon'ble Louis S. Jackson and W. McDonell, *Judges.*

Measurement—Act VI. (B. C.) of 1862, s. 1

Cases Nos. 629 to 638 of 1875.

Special Appeals from a decision passed the Subordinate Judge of Dacca, da the 23rd December 1874, affirm a decision of the Second Moonsiff Moonsheegunge, dated the 8th Septem 1874.

Khajah Assanoollah (Plaintiff), *Appellan*

versus

Shaikh Kadir and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Door Mohun Doss* for Appellant.

Baboos Kalee Mohun Doss, Bhoobun Moh Doss, and *Mohinee Mohun Roy* Respondents.

Application to the Collector, for measurement un Act VI. (B. C.) of 1862, s. 10, can only be made by who is clearly and admittedly the zemindar, or the per entitled to receive the rent.

Jackson, J.—THE special appellant these cases relies upon the provisions section 10 of Act VI. (B. C.) of 1862, upon certain measurement-proceedings wh

d

were taken under that section. It to us, however, that an absolutely y condition precedent is in this case wanting, because it does not appear, the very foundation of the defendfence in this case, that the plaintiff is prietor or the person entitled to the rent of the estate within which ands are situated. It appears to us s only in cases where the applicant is and admittedly the zemindar, or the entitled to receive the rent, that he ke application to the Collector for rement; otherwise, as has been pointed ing the argument, any person would rely at liberty to proceed to any desirart in the mofussil, select a suitable daree, and present himself before the tor, and perhaps obtain an order for rement and the other inquiries directed section, and unless timely objections raised, he might obtain some award the Collector which would be held conre against all comers, not merely as to ngs of persons within that estate, but as to the title of the alleged proprietor. special appeals will be dismissed with s.

The 19th January 1876.

Present:

Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

nment Khas Land—Pottah—Jurisdiction.

Case No. 2887 of 1874.

cial Appeal from a decision passed by e Judicial Commissioner of Kamroop, ted the 27th July 1874, reversing a ecision of the Extra Assistant Commisioner of that District, dated the 4th June 1874.

ksmiram Kholita (Defendant), *Appellant,*

versus

Noraram Atai (Plaintiff), *Respondent.*

Baboo Bykunt Nath Dass for Appellant.

Baboo Bussunt Coomar Bose for Respondent.

A strong claim to consideration, if it does not amount a legal title to the land, cannot entitle the Civil ourt to interfere with the act of the Collector in grantg a pottah of Government khas land.

Macpherson, J.—THE decree of the dicial Commissioner must be set aside.

The defendant having obtained a pottah for the land in question from the Collector, the plaintiff sues substantially for the purpose of having that pottah set aside, and to have it declared that he is entitled to a pottah in preference to the defendant. The plaintiff does not set up a title adverse to the Government, that is to say, he does not claim this land as being land to which he has a title as owner.

The Judicial Commissioner has decided in favour of the plaintiff upon the ground that long occupancy gives him "a strong "claim to consideration, if not a legal claim "to the disputed land."

We do not understand how "a strong claim "to consideration," if it does not amount to a "legal claim" to the land, can entitle the Civil Court to interfere with the act of the Collector in granting a pottah to the defendant of this, which was Government khas, land. If the plaintiff had proved a legal title to this land, or a right of occupancy, the matter would of course have been different. But the Lower Appellate Court not finding that there was any legal title, and the plaintiff not asserting any right except that, as a matter of consideration, the pottah ought to be granted to him in preference to the defendant, the suit was altogether bad, and ought to have been dismissed.

The decree of the Lower Appellate Court is reversed, and the plaintiff's suit is dismissed with costs.

The 19th January 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Certificate of Administration.

Case No. 296 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 21st June 1875.

Wooma Tara Goopta (Opposite Party), *Appellant,*

versus

Kalee Tara Goopta (Petitioner), *Respondent.*

Baboo Bykunt Nath Dass for Appellant.

Baboo Bharut Chunder Dutt for Respondent.

The fact of an applicant being the widow of the deceased, and his heiress, does not of itself constitute any reason why a certificate of administration should be granted to her many (*e.g.*, twenty) years after his death in the absence of anything to show the existence of debts or assets belonging to the estate.

Macpherson, J.—We set aside the order of the Judge altogether. The case is one in which no certificate ought to have been granted.

The deceased Anund Chunder Roy, husband of the petitioner, died in Bysack 1264, more than twenty years ago. There is nothing before the Court to show that there are any debts or assets now belonging to the estate for the collection of which it is necessary that any one should hold a certificate. And the fact, that Kalee Tara, as the widow of her husband, was his heiress, does not of itself constitute any reason why a certificate should be granted to her twenty years after his death.

As regards the Judge's order cancelling the certificate originally granted to Wooma Tara, that order was unnecessary. For the certificate was practically cancelled by the order of the High Court of the 18th of May 1868, when it was declared that Wooma Tara's certificate was valid only during the minority of Kalee Tara. The petitioner, having done nothing on that order of the High Court in 1868, is not now entitled to what she asks for in this petition.

The whole of these proceedings are quite irregular and bad. They are instituted for the purpose of trying various questions—in particular a question as to a solehnama—which can only be properly decided in a regular suit.

The appeal is allowed, and the order of the Judge is set aside with costs.

Vakeel's fee, one gold mohur.

It must be understood that we do not decide any question of right as between any of the parties to these proceedings. It is by regular suit only that any remedy can now be obtained.

The 19th January 1876.

Present:

The Hon'ble A. G. Macpherson and G. Morris, *Judges.*

Application for Execution—Limitation.

Case No. 246 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the [illegible] May 1875, affirming an order of the Moonsiff of Lushkerpore, dated the [illegible] April 1875.

Abdool Hekim (Judgment-debtor), *Appellant,*

versus

Shaikh Aseentoollah (Decree-holder), *Respondent.*

Baboo Nullit Chunder Sen for Appellant.

Baboo Bharut Chunder Dutt for Respondent.

An application for execution is out of time, if made within three years of the last previous application to enforce the decree, and all subsequent proceedings are bad.

A petition praying that the matter of an execution previously applied for should be disposed of along with a similar application in another suit is not an application to enforce execution.

Macpherson, J.—As decided by Markby and Romesh Chunder Mitter, JJ., in the case of Rohinee Nundun Mitter, reported in Volume XXII., Weekly Reporter, page 154, the Limitation Act (IX. of 187[illegible]) is the law by which the application for execution made on the 28th of November 18[illegible] was governed. That being so, the application then made was out of time, because it was not made within three years of the last previous application to enforce the decree, which was on the 31st October 1868. Even if we take the notice which was issued on that application, that notice was dated the 20th November 1868, which was more than three years before the 28th of November 1871.

That application of the 28th November 1871 being barred, all the subsequent proceedings are bad, and therefore execution ought not to have issued on the latest application.

It appears to us that the decree-holder is not entitled to any benefit in this suit from the petition which he is said to have presented on the 12th December 1868. In that

on he did not apply to enforce execu- he simply prayed that the matter of the tion applied for on the 31st October should be disposed of along with an cation for an execution which he made other suit.

e think the lower Courts were wrong olding that the application was not ed; and that they ought to have refused sue execution. We therefore order that whole of the execution-proceedings be side with costs. We assess the vakeel's at one gold mohur.

The 19th January 1876.

Present:

e Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Landlord and Tenant—Splitting the Rent.

Case No. 2769 of 1874.

cial Appeal from a decision passed by e First Subordinate Judge of Chittagong, dated the 22nd August 1874, eversing a decision of the Moonsiff of Rungoneah, dated the 13th May 1873.

ee Chunder Aich (Defendant), *Appellant,*

versus

Ramgutty Kur (Plaintiff), *Respondent.*

aboo Aukhil Chunder Sen for Appellant.

Baboo Bhoobun Mohun Doss for Respondent.

landlord, who has let out land at a certain rent ble in one sum for the whole, cannot, without the ent of the tenant, alter the position of the latter, and that in future so much shall be payable in respect of parcel only, and so much in respect of another.

Macpherson, J.—It seems to us that the gment of the Moonsiff is right, unless is proved that the defendant assented to landlord's assigning to the plaintiff a tion of the rent payable to himself, and laring that the rent so assigned should be yable in respect of a certain part only of land held by the defendant.

A landlord, who has let out land at a tain rent, the rent being payable in one m for the whole, and the land not being let the tenant in separate parcels in respect each of which there is a separate assessment the rent payable to the landlord, cannot, without the consent of the tenant, alter the position the latter, and say that in future so much of the rent shall be payable in respect of one parcel only of the land, and so much in respect of another parcel only. Of course, if the ryot assents to the landlord's altering the nature of his tenure in this manner, either expressly or by paying rent to the parties to whom a particular parcel has been assigned, he would be bound by the new arrangement. But, in the absence of proof of an agreement (express or implied) by the ryot to do so, he is not bound to pay his rent otherwise than according to his contract with his landlord.

The Subordinate Judge must re-try the case himself; and must decide whether the defendant had any notice from the landlord of the new arrangement, and, if so, whether he ever assented to it. He must also decide the issue as to payment.

There was no reason why the Subordinate Judge should have remanded this case; for it seems to us he had before him sufficient materials on which to dispose of the suit himself.

The decree of the Lower Appellate Court is set aside, and the case is remanded for re-trial by that Court.

In the event of the plaintiff's suit being dismissed, it ought to be dismissed with costs.

The costs of this appeal will abide the result of the remand.

The 21st January 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Act VIII. of 1859, s. 273—Insolvency—Procedure.

Case No. 331 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 11th September 1875.

Messrs. Gladstone, Wyllie, and Co. (Decree-holders), *Appellants,*

versus

Woomesh Chunder Chatterjee (Judgment-debtor), *Respondent.*

Mr. Lowe for Appellants.

Baboo Byddonath Dutt for Respondent.

In making the application prescribed by Act VIII. of 1859, s. 273, it is necessary for the judgment-debtor to satisfy the Court that he is acting *bonâ fide*. After the Court is satisfied that the allegations made by the judgment-debtor in his application and under examination are true, it may call upon the execution-creditor to show cause.

Jackson, J.—It appears to us that the order of the Judge, directing the discharge of the judgment-debtor in this case, cannot be sustained. Section 273, no doubt, declares that "any person arrested under a warrant, "in execution of a decree for money, may, "on being brought before the Court, apply "for his discharge, on the ground that he "has no present means of paying the debt, "either wholly or in part; or, if possessed "of any property, that he is willing to "place whatever property he possesses at "the disposal of the Court." It then goes on: "The application shall contain a full "account of all property of whatever "nature belonging to the applicant, whether "in expectancy or in possession, and whe-"ther held exclusively by himself or jointly "with others, or by others in trust for him "(except the necessary wearing apparel "of himself and his family, and the neces-"sary implements of his trade), and of "the places respectively where such pro-"perty is to be found, or shall state that, "with the exceptions above mentioned, "the applicant is not possessed of any "property, and the application shall be "subscribed and verified by the applicant "in the manner hereinbefore prescribed for "subscribing and verifying plaints." Section 274 says: "Upon such application "being made, the Court shall examine the "applicant in the presence of the plaintiff "or his pleader as to his then circumstances "and as to his future means of payment, "and shall call upon the plaintiff to show "cause why he does not proceed against "any property of which the defendant is "possessed, and why the defendant should "not be discharged." In applying these sections the Judge appears to us to have committed what seems a somewhat serious mistake. It seems to be his view that the judgment-debtor, by making the application prescribed by the section, and by verifying the application, throws it entirely on the judgment-creditor to prove the exi of circumstances which authorized being kept in confinement. The J quite omits to see that it is necessa the judgment-debtor, by his application by the examination which he undergo satisfy the Court that he is acting *fide*. The Court, we think, must be satisfied that the allegations made by judgment-debtor in his application under examination are true, and, if so execution-creditor may then be called to show cause. Now the Judge obs that the evidence and the reasons add by the execution-creditor in this case meagre; but, if he had first adverted to case set out by the judgment-debtor, taken into consideration the reasons were for doubting and discrediting application, he might not, perhaps, found it necessary to look into the alle meagreness of the execution-creditor's c It appears to us that the petition and statement of the judgment-debtor were from satisfactory. He put in a schedu which he described that his whole prop was worth Rs. 9. It appears clearly f the inquiry made that his shop in Calc was worth a good deal more than that, it also appears that, immediately before attachment of the shop, he parted goods to a considerable amount, the proce whereof are not accounted for. No do it is alleged that the person who bought goods produced his khatta-books, but t person has not been examined. He ou to have been before the Court, and it not sufficient simply to look into the khat books. Moreover, the judgment-debtor allowed to make a statement that the p perty that was removed from his shop the property of his son-in-law; but that in-law was not named, nor was he call and examined. This shows that the c which he made for his discharge was from satisfactory. We think the order the Judge directing the discharge of th judgment-debtor must be set aside, and th he must be again arrested and brough before the Court. If then he should thin it proper to make any other application, a be able to satisfy the Court that he ough to be discharged, that would be anothe thing for the Judge to consider. Th appellant will be entitled to five gold mohur as costs of this appeal.

The 4th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Execution-sale—Objections—Act XL. of 1858—Hindoo Law—Partition.

Cases Nos. 160, 162, 163 and 164 of 1875.

Miscellaneous Appeals from an order passed by the Subordinate Judge of Bhaugulpore, dated the 17th April 1875.

Mussamut Sobha Kooeree, mother and guardian of Gujadhur Pershad Singh and another, minors (Judgment-debtors), *Appellants,*

versus

Hurdey Narain Mohajun and others (Decree-holders), *Respondents.*

Baboo Ram Churn Mitter for Appellants.

Mr. R. T. Allan and *Baboo Boodh Sen Singh* for Respondents.

Miscellaneous Appeals from an order passed by the Judge of Bhaugulpore, dated the 5th June 1875.

Case No. 185 of 1875.

Bhoneshyam Kooeree, mother and guardian of Baboo Kesho Pershad Singh and another, minors (Petitioners), *Appellants,*

versus

Mussamut Sobha Kooeree (Objector), *Respondent,*

Baboo Doorga Dass Dutt for Appellants.

Baboo Kalee Mohun Dass for Respondent.

Case No. 210 of 1875.

Mussamut Sobha Kooeree, mother and guardian of Gujadhur Pershad Singh and another, minors (Petitioners), *Appellants,*

versus

Rughoo Nath Sahoy and another (Objectors), *Respondents.*

Baboo Kalee Mohun Dass for Appellants.

Mr. R. T. Allan and *Baboo Boodh Sen Singh* for Respondents.

An application of a mother and guardian, on behalf of her minor children, taking exception to the legality of an execution-sale, on the ground of irregularities specified in her petition, should not be rejected merely because no certificate has been furnished under Act XL. of 1858, because s. 3 gives the Court power to proceed with or without a certificate as would seem to it to be proper:

Where such application has been rejected because not made in the proper manner, and the sale has become confirmed by the Lower Appellate Court, no application afterwards made would enable the Court to re-open the question whether the sale had, or had not, been regularly conducted:

For a partition to be valid under the Mitakshara law, it is not necessary that it should be a regular partition by metes and bounds.

Glover, J.—ALL these appeals have been heard together, and we allowed the argument in several of them to proceed beyond what perhaps was strictly proper, in order to see if there was any possibility of enabling the minors through their guardian to put forward any objections to the legality of the sale which they might be in a position to substantiate.

After hearing the argument on both sides and after looking into the records that have come up from the Court below, we are of opinion that, in all the cases which refer to the mother's position as a petitioner on behalf of the minor sons, the order of the Subordinate Judge is right and must be confirmed. The sale of the property in question was fixed for the 3rd August 1874, but for some reason or other, which is not very exactly given, but which appears to have been that Sheo Nundun Pershad Singh had preferred in the interim an appeal to the High Court, the matter was not actually disposed of until the 17th April 1875. That day was fixed by the Subordinate Judge for disposal of the objections heretofore raised by Sheo Nundun and for confirmation of the sale if those objections were not allowed. On the 5th April 1875, the petitioner, Sobha Kooer, wife of the judgment-debtor, Sheo Nundun Pershad Singh, made an application to the Subordinate Judge on behalf of her minor children, taking exceptions to the legality of the sale, on the ground of certain irregularities specified in her petition. The Subordinate Judge refused to receive this application, and we consider he very properly did so, because the vakeel, who presented the petition, had not been appointed in the mode prescribed by law. On the 17th April, the question as to the legality of the sale which had already been put forward by the judgment-debtor, Sheo Nundun Pershad Singh, and all the other questions which had reference to this case, were considered by the Subordinate Judge, and on that day he passed

the formal order confirming the sale. No doubt this order must have been passed after consideration of the objections which had been originally put forward by the absconding judgment-debtor, Sheo Nundun Pershad Singh—any how, on the 17th April, there was that order passed. And after that order it was impossible for him to take up the matter *de nova* or to go into the question again as to whether or not the sale has been irregular.

On the 30th April, a fortnight after the sale had been confirmed, the present petitioner made another application by a duly-appointed vakeel, but that application was rejected. If the petitioner had made her application properly before the sale was confirmed, that is, on the first occasion, or at any other time before the 17th April, we have no doubt we should have looked into her objections and have seen whether or not the Subordinate Judge had exercised a proper discretion in throwing out her application. And we think that we should have felt ourselves justified in saying that, to reject an application of this sort merely because there had been no certificate furnished under Act XL. of 1858, was not an exercise of reasonable discretion, because section 3 of that Act gives the Court power to proceed with or without a certificate as would seem to it proper. And this was just the sort of case in which the Court might have proceeded, although the certificate of guardianship had not been furnished. But as no application was made in the proper manner, and as the sale became confirmed by the order of the Subordinate Judge on the 17th April, no application afterwards made, would enable the Court to re-open the question or to give any power to the Court to take into consideration the question whether the sale had or had not been regularly conducted. But as this order has the effect of making the petitioner no party to the application under section 256, she is not barred by section 257 of the Code, but can, if she so choose, bring a regular suit to contest the sale. In cases Nos. 160, 162, 163 and 164, therefore, the order of the Subordinate Judge must be upheld and the appeal dismissed with costs.

Case No. 185 is an application by the widow of the judgment-debtor's brother, on behalf of her nephew, for a certificate, and the Judge has refused it, on the ground that this Court had, in a former case between the parties, decided that no certificate under Act XL. of 1858, regarding the appointment of a guardian, could be granted so l the property was joint and the shares members of the family not defined. Judge says that, as the property is ju in the same state as it was when that d was passed, that decision is binding. supposing the premises to be correct, h sion will, no doubt, be correct also. find there is a distinct allegation in the that the property has since been parti and the petition further states the the particular members of the fami have in the property. We think it fair to throw out the application first ascertaining whether there is a in this statement or not. And the must make an enquiry into the all contained in the petition, as to w since the former application, there ha a partition of the property betwe members of this family. If there ha a partition, and the shares have been ately defined, there will be no objec a manager being appointed for takin of the interests of the minors. Of in making the enquiry, the Judg understand that it is not necessary partition to be valid under the Mita law that there should be a regular pa by metes and bounds. This case remanded to the Judge for an enqu this point.

Costs of this appeal will abide the e

No. 210 was an application by Shee dun's wife. It is not very easy to stand what the exact nature of her cation was, because she asks for dozen things, and at the end of it be a manager may be appointed in ord the interests of the minors may n injured. If we take this to be an appl for the appointment of a manager, th same objection will apply to it as application which has just been consi namely, that this Court has laid it that such an appointment cannot be where there is no separate and c definition of shares. It does not ap us that there is any reason for inte with the order of the Judge in this The appeal will be dismissed with cos

Mitter, J.—I concur.

b

The 17th January 1876.

Present:

he Hon'ble W. F. McDonell, *Judge.*

Issues—Appellate Court.

Case No. 942 of 1875.

ial Appeal from a decision passed by e Second Subordinate Judge of the -Pergunnahs, dated the 18th February 75, modifying a decision of the First oonsiff of Diamond Harbour, dated e 18th April 1874.

Pearee Mohun Mookerjee (Plaintiff), *Appellant,*

versus

Huro Pershad Roy Chowdhry and others (Defendants), *Respondents.*

Baboo Ashootosh Mookerjee for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

If a Lower Appellate Court thinks that the defendants were taken unawares as to an issue involving plaintiff's claim to land, which was framed and tried by the first Court, it ought to call for fresh evidence on that issue, and not dismiss the plaintiff's case summarily, for such a course would debar the plaintiff, in future, from raising the claim.

The third ground urged in this appeal is, in the opinion of this Court, valid, *viz.*, that regard being had to the whole pleadings in the case, the Lower Appellate Court has erred in law in applying the case of Ishan Chunder Singh *vs.* Shyama Churn Bhutto to the present case. It is true that in his plaint the plaintiff claimed the land in dispute as forming part of the land hitherto belonging to Tarinee Churn Bose, and measured under dagh 301 of a certain chittah; but the written statement, the admission of the defendants, and the issues fixed after the oral examination of the parties, widened the contention, and it is evident that the Moonsiff's judgment proceeded on grounds consistent with the pleadings. The issue framed by the Moonsiff was not whether the disputed land was part of that belonging to Tarinee Churn Bose, but the general issue whether the disputed land belonged to the plaintiff or to the Chowdhry defendants. The Moonsiff then found that the land was not part of Tarinee Churn Bose's land, but as the land extended beyond the red line, and as the defendants admitted that they had no land beyond this red line, and that the plaintiff was proprietor of the estate in which the defendant's lakhiraj land was situated, they were, therefore, entitled to all the rest of the land except that included within the red line above referred to. It may be, as argued by the Subordinate Judge, that the defendants only met the case of the plaintiff as laid in the plaint, and that if the plaintiff had come under different titles, the defendants might have answered differently. Now, if the Subordinate Judge thought that the defendants had been taken unawares, he should have called for fresh evidence on that issue, and should not have dismissed the plaintiff's case summarily, for it is clear that, if the plaintiff's suit is dismissed *in toto*, the issue as to whether the disputed land belongs to him or not will not have been fairly tried, and still as this issue was framed and tried by the first Court, the plaintiff would be debarred in future from raising any claim to the land. The case must, therefore, be remanded to the Lower Appellate Court under section 354 of Act VIII. of 1859 to try the issue whether the disputed land belongs to the plaintiff or not. Any fresh evidence which the parties may wish to adduce on this issue may be admitted, and the finding on the evidence should be returned to this Court. This order of remand will only relate to the portion marked (S). In regard to the rest, the order of the Lower Appellate Court is final.

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the formal order confirming the sale. No doubt this order must have been passed after consideration of the objections which had been originally put forward by the absconding judgment-debtor, Sheo Nundun Pershad Singh—any how, on the 17th April, there was that order passed. And after that order it was impossible for him to take up the matter *de nova* or to go into the question again as to whether or not the sale has been irregular.

On the 30th April, a fortnight after the sale had been confirmed, the present petitioner made another application by a duly-appointed vakeel, but that application was rejected. If the petitioner had made her application properly before the sale was confirmed, that is, on the first occasion, or at any other time before the 17th April, we have no doubt we should have looked into her objections and have seen whether or not the Subordinate Judge had exercised a proper discretion in throwing out her application. And we think that we should have felt ourselves justified in saying that, to reject an application of this sort merely because there had been no certificate furnished under Act XL. of 1858, was not an exercise of reasonable discretion, because section 3 of that Act gives the Court power to proceed with or without a certificate as would seem to it proper. And this was just the sort of case in which the Court might have proceeded, although the certificate of guardianship had not been furnished. But as no application was made in the proper manner, and as the sale became confirmed by the order of the Subordinate Judge on the 17th April, no application afterwards made, would enable the Court to re-open the question or to give any power to the Court to take into consideration the question whether the sale had or had not been regularly conducted. But as this order has the effect of making the petitioner no party to the application under section 256, she is not barred by section 257 of the Code, but can, if she so choose, bring a regular suit to contest the sale. In cases Nos. 160, 162, 163 and 164, therefore, the order of the Subordinate Judge must be upheld and the appeal dismissed with costs.

Case No. 185 is an application by the widow of the judgment-debtor's brother, on behalf of her nephew, for a certificate, and the Judge has refused it, on the ground that this Court had, in a former case between the parties, decided that no certificate under Act XL. of 1858, regarding the appointment of a guardian, could be granted so long the property was joint and the shares of members of the family not defined. T Judge says that, as the property is just n in the same state as it was when that decis was passed, that decision is binding. A supposing the premises to be correct, his de sion will, no doubt, be correct also. But find there is a distinct allegation in the petiti that the property has since been partitione and the petition further states the sha the particular members of the family n have in the property. We think it hard fair to throw out the application witho first ascertaining whether there is anythi in this statement or not. And the Ju must make an enquiry into the allegati contained in the petition, as to wheth since the former application, there has be a partition of the property between members of this family. If there has be a partition, and the shares have been sep ately defined, there will be no objection a manager being appointed for taking c of the interests of the minors. Of cou in making the enquiry, the Judge understand that it is not necessary for partition to be valid under the Mitaksh law that there should be a regular partiti by metes and bounds. This case will remanded to the Judge for an enquiry this point.

Costs of this appeal will abide the event.

No. 210 was an application by Sheo Nu dun's wife. It is not very easy to unde stand what the exact nature of her app cation was, because she asks for half dozen things, and at the end of it begs th a manager may be appointed in order th the interests of the minors may not injured. If we take this to be an applicati for the appointment of a manager, then th same objection will apply to it as to th application which has just been considere namely, that this Court has laid it dow that such an appointment cannot be mad where there is no separate and distin definition of shares. It does not appear us that there is any reason for interferin with the order of the Judge in this ca The appeal will be dismissed with costs.

Mitter, J.—I concur.

The 17th January 1876.

Present:

The Hon'ble W. F. McDonell, *Judge.*

Issues—Appellate Court.

Case No. 942 of 1875.

ecial Appeal from a decision passed by the Second Subordinate Judge of the 24-Pergunnahs, dated the 18th February 1875, modifying a decision of the First Moonsiff of Diamond Harbour, dated the 18th April 1874.

Pearee Mohun Mookerjee (Plaintiff), *Appellant,*

versus

Huro Pershad Roy Chowdhry and others (Defendants), *Respondents.*

Baboo Ashootosh Mookerjee for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

If a Lower Appellate Court thinks that the defendants were taken unawares as to an issue involving plaintiff's claim to land, which was framed and tried by the first Court, it ought to call for fresh evidence on that issue, and not dismiss the plaintiff's case summarily, for such a course would debar the plaintiff, in future, from raising the claim.

THE third ground urged in this appeal is, in the opinion of this Court, valid, *viz.*, that regard being had to the whole pleadings in the cause, the Lower Appellate Court has erred in law in applying the case of Ishan Chunder Singh *vs.* Shyama Churn Bhutto to the present case. It is true that in his plaint the plaintiff claimed the land in dispute as forming part of the land hitherto belonging to Tarinee Churn Bose, and measured under dagh 301 of a certain chittah; but the written statement, the admission of the defendants, and the issues fixed after the oral examination of the parties, widened the contention, and it is evident that the Moonsiff's judgment proceeded on grounds consistent with the pleadings. The issue framed by the Moonsiff was not whether the disputed land was part of that belonging to Tarinee Churn Bose, but the general issue whether the disputed land belonged to the plaintiff or to the Chowdhry defendants. The Moonsiff then found that the land was not part of Tarinee Churn Bose's land, but as the land extended beyond the red line, and as the defendants admitted that they had no land beyond this red line, and that the plaintiff was proprietor of the estate in which the defendant's lakhiraj land was situated, they were, therefore, entitled to all the rest of the land except that included within the red line above referred to. It may be, as argued by the Subordinate Judge, that the defendants only met the case of the plaintiff as laid in the plaint, and that if the plaintiff had come under different titles, the defendants might have answered differently. Now, if the Subordinate Judge thought that the defendants had been taken unawares, he should have called for fresh evidence on that issue, and should not have dismissed the plaintiff's case summarily, for it is clear that, if the plaintiff's suit is dismissed *in toto*, the issue as to whether the disputed land belongs to him or not will not have been fairly tried, and still as this issue was framed and tried by the first Court, the plaintiff would be debarred in future from raising any claim to the land. The case must, therefore, be remanded to the Lower Appellate Court under section 354 of Act VIII. of 1859 to try the issue whether the disputed land belongs to the plaintiff or not. Any fresh evidence which the parties may wish to adduce on this issue may be admitted, and the finding on the evidence should be returned to this Court. This order of remand will only relate to the portion marked (S). In regard to the rest, the order of the Lower Appellate Court is final.

The 20th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Hindoo Law—Widow—Maintenance—Purchaser—Heir.

Case No. 2608 of 1874.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 29th May 1874, affirming a decision of the Subordinate Judge of that District, dated the 30th July 1873.

Baboo Goluck Chunder Bose (Defendant), *Appellant,*

versus

Ranee Ohilla Dayee (Plaintiff), *Respondent.*

Baboo Obhoy Churn Bose for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Under the Hindoo law, property purchased from the heir with notice that a widow is entitled to be maintained out of it, continues while in the hands of the purchaser to be charged with that maintenance:

Before following properties from which she is entitled to obtain her maintenance in the hands of the purchaser, a Hindoo widow is not bound, in all cases, to attempt recovering her maintenance from the heir-at-law.

Mitter, J.—We do not think it necessary to call upon the other side in this case. Three points have been raised in special appeal:

First.—That the claim of maintenance should not have been held as a charge upon the estate in the hands of the defendant.

Secondly.—That the plaintiff should not have been allowed to recover a decree against the defendant without first having recourse to a suit against the heir.

And *thirdly.*—That the debts on acc of which the family property was sold purchased by the defendant, being d which were binding upon the family, plaintiff has no right to charge her m tenance upon that property in the hand the purchaser.

As regards the first question, it is necessary for us to decide whether, in cases under the Hindoo law, maintenanc to be deemed as a charge upon property in possession of a subsequent assignee from heir. It has been settled by more than decision of this Court, that, where a purch purchases property from the heir with n that a Hindoo widow is entitled to be m tained out of it, the property in the h of the purchaser continues to be char with that maintenance. In this case Courts have found the fact that the defe ant, before he purchased the property, receive such notice. That being so, think that the lower Courts are right making the property in the hands of defendant liable for maintenance of plaintiff.

As regards the second question that been argued before us, it seems to me th is not a correct proposition of Hindoo to say that, in all cases, a Hindoo widow not entitled to follow properties from wh she is entitled to obtain her maintenance the hands of the purchaser, unless she first attempts to recover her maintena from the the heir-at-law. It may be that certain cases, where the defence is that s cient property is still in the hands of heir-at-law, from which the maintenance be recovered, the person entitled to ma tenance might not be allowed to recove from the purchaser of a small portion of family-property without first attempting recover it from the properties in the pos sion of the heir-at-law. But in this c there was no such defence, and, in eithe the Courts below, the objection in this f was not raised. And we do not think we ought to allow it to be raised here for first time in special appeal.

The same remarks will apply to the th ground of special appeal which has b argued before us; that was never raised either of the Courts below; and we do think that we ought to allow it to be rai for the first time in special appeal.

Upon these grounds we think that special appeal ought to be dismissed costs.

Glover, J.—I concur.

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The 20th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Plan—Exhibits.

Case No. 2667 of 1874.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 3rd July 1874, reversing a decision of the Moonsiff of Gurbetta, dated the 17th July 1873.

Damoo Mahata (Defendant), *Appellant,*

versus

Ranee Doya Coomaree and another (Plaintiffs), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboos Doorga Mohun Doss and *Bhubun Mohun Doss* for Respondents.

The Lower Appellate Court's decree in this case was set aside, because it was mainly based upon a plan produced by the plaintiff, which was not proved by witnesses to be correct, and which was not mentioned in a list of admitted exhibits prepared by the first Court.

Mitter, J.—We think that the objection taken by the special appellant that the judgment of the Lower Appellate Court cannot stand, because it was mainly based upon a plan produced by the plaintiff which was not proved to be correct by witnesses, must prevail. It appears that this plan was produced by the plaintiff with the plaint, and beyond that, no steps were taken by him to establish that it was a correct representation and delineation of the disputed land.

We further find that in the list, which was prepared by the Moonsiff, of the exhibits that were admitted, this document was not at all mentioned. Under these circumstances, we do not think that the Judge was right in basing his judgment upon this plan.

We therefore set aside the decree of the Lower Appellate Court, and remand the case to that Court for re-trial. This order will not, of course, preclude the Judge from the exercise of his discretion to allow the plaintiff an opportunity of proving the plan on which the judgment is based.

Costs will abide the result.

Glover, J.—I concur.

The 24th January 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Possessory Suit—Survey and Measurement.

Case No. 1024 of 1875.

Special Appeal from a decision passed by the Deputy Commissioner of Kamroop, dated the 23rd February 1875, affirming a decision of the Moonsiff of Gowhatty, dated the 30th March 1874.

Kalee Dutt Kaesto (Plaintiff), *Appellant,*

versus

The Collector of Kamroop and others (Defendants), *Respondents.*

Baboo Bykunt Nath Doss for Appellant.

Baboo Ram Churn Mitter for Respondents.

A suit ought not to be dismissed on the ground that the land claimed in it has not been surveyed, and that the Court is, therefore, not in a position to say whether or not Government has a title to it, but should be decided with reference to plaintiff's ability or otherwise to prove his title.

Macpherson, J.—We think that this case must go back to the Lower Appellate Court in order that it may try that which is the only real issue in the case, namely, whether the plaintiff proves that the land claimed belongs to him as alleged in the plaint. The plaintiff must of course prove that he is entitled to the decree for which he asks.

The Deputy Commissioner has really avoided deciding anything, on the ground that the property has not been surveyed, and that, therefore, he was not in a position to say whether the land claimed is or is not land to which the Government has a title. The possibility of a survey being made hereafter is no reason why the question should not be decided now; and it is the duty of the Deputy Commissioner to decide now whether the plaintiff has a right to the land claimed.

Mere measurement cannot settle the question one way or the other. The Deputy Commissioner must examine into the circumstances under which the plaintiff held the land (if he ever did hold it), and must determine whether the plaintiff is entitled to the land he claims.

Costs will abide the result.

The 24th January 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Occupation by Government—Adverse Possession.

*Appeal under section 15 of the Letters Patent, from a decision passed by the Hon'ble W. F. McDonell, one of the Judges of this Court, dated the 29th July 1875, in Special Appeal No. 2316 of 1874.**

Dino Nath Mookerjee (Defendant), *Appellant,*

versus

Brojo Coomar Mullick (Plaintiff), *Respondent.*

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* The 29th July 1875.

Present:

The Hon'ble W. F. McDonell, *Judge.*

Case No. 2376 of 1874.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 22nd May 1874, modifying a decision of the Moonsiff of Meherpore, dated the 30th December 1872.

Dino Nath Mookerjee (Defendant), *Appellant,*

versus

Brojo Coomar Mullick (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Doorga Dass Dutt* for Appellant.

Baboos Mohiny Mohun Roy and *Bydonath Dutt* for Respondent.

In this case the points raised in appeal are, *first,* that the claim is barred by limitation; *secondly,* that the onus was on the plaintiff to prove that the land was his khamar, and on the merits that the Lower Appell Court has given a decision contrary to the evide As regards limitation, it is quite clear that the plaint claim is not barred in that the cause of action did arise until Government began paying the rent to defendant. It is true that the Government was possession before this, but the possession of the Gove ment was not adverse. It is clear that they never inte ed to remain in possession without paying rent, consequently, as the plaintiff was the zemindar *primâ facie* entitled to the rent, the onus was righ thrown on the defendant to prove his title as an inte mediate holder. Lastly, on the merits, the Lower App late Court has found on the evidence that one beeg eight cottahs belongs to the plaintiff, and as adver possession is not proved against him, he is entitled possession. It is argued that the chittas were not a missible as evidence, but seeing that no objection wa taken to them, either in the first or in the Appellate Court, this objection cannot be heard in special appeal. The appeal is dismissed with costs.

Baboos Hem Chunder Banerjee and *Door Dass Dutt* for Appellant.

Baboo Kalee Prosunno Dutt for Respond

The occupation of land by Government without p ment of rent, cannot be construed as possession adv to the zemindar.

Macpherson, J.—We see no reason interfere with the decision of Mr. Justi McDonell in this case. The circumstanc are no doubt somewhat peculiar. But District Judge has found, with regard to one beegha and eight cottahs for which gave a decree that they did not fall wit the jummae land of the defendant, but wi in the mâl or zemindaree land of the pla iff. As plaintiff is admittedly the zem dar of the entire village within which land in suit is situated, the occupation by Government of this land without payment rent to any one cannot be construed as p session adverse to him. Nor again can it held, as has been argued before us, that execution of the kubooleut by Governme in 1277 in favour of defendant raises a p sumption of previous proprietary right the land on his part. It may be that the is not much evidence of actual possession the zemindar within twelve years before t suit was commenced. But there seems to quite enough for the present purpose co sidering what was the nature of the la and the manner in which it was occupied the Government. Under all the circu stances we should scarcely look for any ve distinct or specific acts of possession on t part of the zemindar.

The appeal is dismissed with costs.

The 24th January 1876.

Present:

e Hon'ble W. F. McDonell, *Judge.*

: VIII. (B. C.) of 1869, s. 102—Special Appeal.

Case No. 955 of 1875.

l Appeal from a decision passed by Additional Judge of Furreedpore, d the 5th February 1875, affirming ecision of the Moonsiff of Goalundo, d the 26th August 1874.

eenath Roy (Defendant), *Appellant,*

versus

oddeen Shaha (Plaintiff), *Respondent.*

Babu Shushee Bhoosun Dutt for Appellant.

Mohinee Mohun Roy for Respondent.

ppeal lies to the High Court in a suit which is for rent and is valued at less than Rs. 100, where gment determines no question relating to in- n land as between parties having conflicting

this appeal being taken up, a preli- y objection was raised that, under n 102 of Act VIII. (B. C.) of 1869, ppeal would lie to this Court, in that uit is merely one for rent and is d at less than Rs. 100, and no question ght to enhance or vary the rent nor uestion relating to interest in land as en parties having conflicting claims o has been determined by the judg- . In this case the party who is said e defendant to be the landlord did not ar, and consequently no question relating erest in land as between parties having icting claims was determined by the ment. Holding therefore under the rul- of this Court in 23 Weekly Reporter, 436, that this objection must prevail, ppeal is rejected with costs.

The 24th January 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Land Acquisition Act, s. 58—Compensation-award.

Appeal under section 15 of the Letters Patent against the decision of the Hon'ble W. F. McDonell, one of the Judges of this Court, dated the 12th July 1875, in Special Appeal No. 2686 of 1874.

Kaminee Debia (Plaintiff), *Appellant,*

versus

Protap Chunder Sandyal (Defendant), *Respondent.*

Baboos Troyluckho Nath Mitter and *Anund Gopal Paleet* for Appellant.

Baboo Bama Churn Banerjee for Respondent.

An award under the Land Acquisition Act cannot be affected by a suit to recover from the party to whom compensation has been awarded, and to have plaintiff's title declared to the land concerned.

Macpherson, J.—We think that section 58 of the Land Acquisition Act is not applicable to this case. The plaintiff's suit was not brought for the purpose of setting aside an award under the Land Acquisition Act; nor was it a suit against any person for anything done in pursuance of that Act. It was a suit to recover from the defendants the sum of Rs. 20 which had been paid to one of them as compensation awarded under the Land Acquisition Act, and also to have the plaintiff's title declared to two cottahs of land which she claimed.

The award under the Land Acquisition Act cannot be, in any way, affected by this suit; and, therefore, section 58 of the Land Acquisition Act cannot apply.

The decree that has been appealed against must be reversed, and that of the Subordinate Judge of Hooghly of 22nd August 1874 must be restored and affirmed. The appellant will have her costs of this appeal from the respondent.

The 24th January 1876.

Present:

The Hon'ble W. F. McDonell, *Judge.*

Perpetual Leases—Eviction.

Case No. 2280 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 23rd June 1874, reversing a decision of the Moonsiff of Salikha, dated the 1st April 1874.

Kalee Dass Rana (Plaintiff), *Appellant,*

versus

Nistarinee Bewa and another (Defendants), *Respondents.*

Baboo Kumla Kant Sen for Appellant.

Baboo Becharam Mookerjee for Respondents.

Where a holding is held under an agreement of perpetual lease, the lessee cannot be ousted without notice.

THE plaintiff in this case sued for khas possession on the expiration of the term of his kubooleut. Both the Courts have found that the plaintiff has failed to prove that he leased the land out for a term of five years. The Lower Appellate Court has found, as a fact, upon the evidence adduced, that the lease was not for five years, but that the land was let out to the defendants under an agreement of perpetual lease. Both the Courts have likewise held that no notice to quit was served upon the defendants. It seems to me that the Lower Appellate Court, when it found that no notice was served on the defendants, ought to have dismissed the plaintiff's suit, because, if, as held by that Court, the holding was proved to have been held under an agreement of perpetual lease, the defendants certainly could not be ousted without notice. Whether a promise to lease is sufficient to give the defendants a valid title is a point which need not be inquired into in the present suit. The order of the Subordinate Judge dismissing the plaintiff's claim is, therefore, upheld, and this appeal is dismissed, but without costs.

The 24th January 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, C. *Justice*, and the Hon'ble E. G. B. *Judge.*

Transfer of Right of Occupancy.

Case No. 19 of 1875.

Special Appeal from a decision passed the Second Subordinate Judge of Mymensingh, dated the 29th September 18 affirming a decision of the Moonsiff Jamalpore, dated the 28th June 1873.

Mahomed Tumeezooddeen Mundul (Plaintiff), *Appellant,*

versus

Lukhee Narain Dey Sircar and anothe (Defendants), *Respondents.*

Baboo Nil Madhub Bose for Appellant.

Baboo Doorga Mohun Doss for Respondents.

A deed which purports to pass a mere right of oc pancy in land is invalid unless possession is taken u it by the transferee.

Garth, C.J.—THE plaintiff in this c sues for possession of a 10-anna 6-pie sh of a jote, on the allegation that he purchas the same from Soobul Mundul, the joted on the 25th Bhadro 1278 (correspondi with 9th September 1871), since which d the plaintiff says he has had possessi The jote was attached by the defend under a decree which he obtained agai Soobul; and on Soobul's death in 1871, defendant obtained a decree against Mes the guardian of Soobul's minor son, un which decree the property was sold, and t defendant became the purchaser.

The defendant says that the plaintiff ne did purchase the property or take possessio of it, and that his deed is a fabrication.

The Lower Appellate Court has decide that, as a matter of law, a deed such as th set up by the plaintiff, which purports t pass a mere right of occupancy in the lan is invalid, or at any rate invalid unle possession be taken under it by the trans feree, and he cit two authorities* fo his proposition.

* 22 W. R., p. 22, F. B. R.; 22 W. R., p. 200.

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We have looked into those authorities, and think that as the Judge has found, as a t, that the plaintiff never had possession of property, he was right in deciding that ing did pass to the plaintiff by his ged transfer.

The appeal will, therefore, be dismissed a costs.

The 24th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Execution-proceedings—Subsisting Attachment—Jurisdiction.

Case No. 223 of 1875.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 9th April 1875, reversing an order of the Moonsiff of Culna, dated the 28th September 1874.

Sreenath Banerjee (Decree-holder), *Appellant,*

versus

Purrum Sookh Chunder and another (Judgment-debtors), *Respondents.*

Baboos Bama Churn Banerjee and *Bipro Doss Mookerjee* for Appellant.

Baboo Sreenath Doss for Respondents.

Where execution had been issued by a Sudder Ameen, and notwithstanding the proceedings were struck off the file, a consequent attachment was pending when that office was abolished (by Act XVI. of 1868), HELD that the Sudder Moonsiff, who succeeded to the jurisdiction of the Sudder Ameen, had power to take up the case and issue execution-proceedings.

Glover, J.—WE have heard this miscellaneous appeal *ex parte.* No one has appeared for the respondent, his vakeel, Baboo Sreenath Doss, being, we are told, absent from Calcutta on business in the mofussil. It appears to us not proper, under the circumstances, to postpone the hearing of the appeal on his account.

The Judge says that the question he has to decide is whether the sale of a certain property belonging to the judgment-debtor, on the 28th January 1871, by the Sudder Moonsiff of Burdwan, was legal or not.

The original decree was passed by the Sudder Ameen of Burdwan on the 21st December 1865. The first execution was taken out two years afterwards, and struck off on the 21st December 1867, the decree-holder having then got possession of the land decreed. There remained, however, certain sums due to the decree-holder for costs.

Act XVI. of 1868, which was passed a year after, abolished the office of Sudder Ameen.

On the 31st August 1870, two years after the office of Sudder Ameen was abolished, the decree-holder applied again for execution for costs; and on this execution the property was sold on the 28th January 1871. The Judge, going upon the proviso of section 12 of the Act, considered that the striking-off of the proceedings in 1867 was a final termination of the suit, and, therefore, when Act XVI. was passed, no proceedings were pending in the Court of the Sudder Ameen which could be completed by the Sudder Moonsiff who succeeded to the old Court's jurisdiction. But we find on turning to the record that, at the time the Act was passed, there was an attachment pending at the instance of the creditor upon the property, which was afterwards sold in 1871; and there is nothing shown upon which it could be presumed, or supposed, that the attachment was withdrawn. And it has been frequently ruled by this Court that an attachment once made must be presumed to be subsisting, until it is shown to have been withdrawn. There being, at the time when the Act was passed, an attachment subsisting, it can hardly be said, we think, that there were no proceedings pending in the Court of the Sudder Ameen at the time when that office was abolished. And if proceedings were pending, then the Sudder Moonsiff, who succeeded to the jurisdiction of the Sudder Ameen, had power to take up the case and to issue execution-proceedings. It appears to me, therefore, that the sale of the 28th January 1871 cannot be impugned on the ground of want of jurisdiction.

But, as a matter of fact, the question as to the validity of the sale is only indirectly in issue in this matter, because it appears that the decree-holder has taken possession of the property sold. What he now wants is to execute the decree for the balance of costs which the decree-holder says is due to him, and, if the proceedings were legally pending on the 28th January 1871, to keep this decree alive, the present application for the balance

of the debt being within three years from that time is not barred by limitation.

It appears to me, therefore, that the order of the Judge is not correct, and it must be set aside, and that of the first Court restored with costs.

Mitter, J.—I concur.

The 24th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Application for Execution—Limitation Act (IX. of 1871), Sch. II., art. 167.

Case No. 340 of 1875.

Miscellaneous Appeal from an order passed by the Officiating Judge of West Burdwan, dated the 23rd July 1875, affirming an order of the Moonsiff of Bancoorah, dated the 15th May 1875.

Lala Huree Sunkur Sahoy (Decree-holder), *Appellant,*

versus

Krishna Kant Dutt and another (Judgment-debtors), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

A decree-holder, having first asked the Court to attach certain immoveable properties, applied subsequently for the issue of a warrant of arrest, and finally prayed the Court not to proceed with those two applications, but to allow him to attach certain other properties; and this prayer was allowed:

HELD that this was virtually an abandonment of the two original applications which were virtually struck off, and that the last application was the one which came within the meaning of the new Limitation Law, art. 167.

Mitter, J.—WE think that in this case the judgment of the Lower Appellate Court is not correct. This appeal has been preferred by the decree-holder, the lower Courts having held that the execution of the decree is barred by the law of limitation.

It appears that the first petition for execution, so far as it is material for the adjudication of this appeal, was made on the 6th October 1871. The prayer of the decree-holder in that application was for the sale of certain immoveable properties menti therein. The decree-holder, for some re or other, did not proceed with that applic but, on the 28th December 1871, he ap to the Court to issue a warrant of a against the debtor. Again, without proc ing with that application also, the dec holder, on the 2nd March 1872, made a t application, asking the Court to attach ce immoveable properties, and to bring the sale for satisfaction of the decree. appears that this was complied with, certain properties, in accordance with application, were attached and sold, and of the decree was satisfied. For the resi the present application was made by decree-holder on the 1st February 18 And the judgment-debtor has objected to decree being put into execution on ground that, under article 167 of the Limitation Act, the decree is barred by law of limitation.

The Courts below have decided that, un that article, the decree-holder's right to e cute the decree has been barred.

We do not think that this decision is c rect. Under the article in question, decree-holder is entitled to three years fr the date "of applying to the Court to force or to keep in force the decree order." In this case it cannot be said t the application of the 2nd March 1872 not an application "to enforce or to keep force the decree." No doubt, the applica referred to in this part of the article is first application for execution. But, fr the circumstances which we have mentio above, the petition of the 2nd March r may be fairly taken to have been the f petition to execute the decree by attachm and sale of certain property mentioned in t petition. It is true that two other previ applications were made to execute the dec namely, on the 6th October 1871, and the 28th December 1871, in the first ask the Court to attach certain immoveable p perties, and in the last to issue a warran arrest; but it appears to us that when u mately the decree-holder asked the Co not to proceed with those two applicatio but to allow him to attach certain other p perties and to sell them in satisfaction of decree, and when that prayer was allow it was virtually an abandonment of the or nal applications which were made. It tually amounted to an order for striking the applications of those two dates Althou in point of form, we do not find any such or existing on the record, but substantially t

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eedings of the Court in execution of this e amounted to that. We therefore think the application, dated the 2nd March , was an application mentioned in arti- 167, which was put in by the decree- er to enforce his decree. And as the ent application has been made within e years from that date, the decree-holder early within time.

or these reasons we think that the deci- s of the lower Courts are not correct, we accordingly reverse those decisions, allow the judgment-creditor to proceed the execution of his decree.

he appeal is decreed with costs.

The 25th January 1876.

Present:

e Hon'ble Sir Richard Garth, *Kt., Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Ejectment—Termination of Tenancy.

Case No. 2136 of 1874.

ecial Appeal from a decision passed by the Judge of Purneah, dated the 1st June 1874, reversing a decision of the Moonsiff of Trikoulee, dated the 19th December 1873.

Surroop Singh and others (some of the Defendants), *Appellants*,

versus

aboo Pertab Singh (Plaintiff), *Respondent*.

Baboo Anund Gopal Paleet for Appellants.

Mr. Trevelyan and *Moonshee Mahomed Yusuf* for Respondent.

Where a Judge decreed a suit for ejectment on the ound that it was alleged in the plaint that the defend- t's tenancy was terminable and had terminated, and the defendants had not raised in their statement the question of its actual termination, the grounds of the affirmative conclusion were held to be insufficient in law, the defence having been that the tenancy was not terminable.

Garth, C.J.—We think that this is a very clear case, and that the Lower Appellate Court has made a mistake. The plaintiff's case was, *first*, that the defendants were his tenants, and that their tenancy was one which was capable of being terminated; and, *secondly*, that their tenancy had actually terminated. The defendants' case was that they held under a tenancy which was not terminated.

This being the contention on either side, the Judge of the Lower Appellate Court has found, and properly found, that the tenancy was established by the evidence, and that it was a terminable one; but when he came to deal with the question, whether the tenancy had actually terminated, he seems to have found this question in the affirmative, on grounds which appear to us very insufficient in point of law. He says that the plaintiff, having made an allegation in his plaint that the tenancy was terminable, and had terminated, and the defendants not having raised in their statement the question of its actual termination, "it appears from the pleadings and the evidence that the plaintiff is entitled to entry at once." We really cannot understand what the learned Judge means by this. It is quite clear from the defendants' statement that they do not admit that the tenancy had terminated. Their defence was that it was *not terminable*, which implies that it had not been determined; and, therefore, it appears to us impossible to say with truth that, upon the pleadings, there is any admission by the defendants that the tenancy had terminated. Nor can it be said, as it was contended by the plaintiff here, that the defendants admitted in the former suit that their tenancy had terminated. All that was admitted in that suit was, that they were tenants at a certain rent, and that the rent had been paid for a certain number of years.

There was, therefore, no evidence that the defendants' tenancy had come to an end, and we consider that the Judge had no ground for so finding. His decision must therefore be reversed; and we do not think it right under the circumstances to send the case back to him for a re-trial. We confirm the decision of the Moonsiff, but, at the same time, we do not wish it to be understood that in confirming his decision we agree with all that he says in his judgment. The appeal will be decreed with costs in all the Courts.

The 25th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Decree against the Dead—New trial.

Case No. 133 of 1875.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 2nd April 1875, affirming an order of the Moonsiff of Culna, dated the 20th November 1874.

Shama Puddo Moitro and another (Judgment-debtors), *Appellants,*

versus

Dino Nath Bagchee and others (Decree-holders), *Respondents.*

Baboos Taruck Nath Sen and *Gopee Nath Mookerjee* for Appellants.

Baboo Kalee Prosunno Dutt for Respondents.

Where a suit, which had been decreed in the first Court, was dismissed in appeal after the death of the plaintiff, and the representatives of the latter had not aided in keeping the appellant ignorant of his death, the High Court met the difficulty, as to executing a decree against a dead man, by directing the Lower Appellate Court to try the appeal *de novo,* making the dead man's representatives respondents.

Glover, J.—NEEL MONEE MOITRO brought a suit against the judgment-creditors in this case, and got a decree on December 15th, 1873. The defendants appealed and got the decree reversed, and Neel Monee's suit dismissed. They then took out execution for costs and wassilat (Neel Monee having taken possession under the original decree), but were opposed by the sons of Neel Monee, on the ground that their father had died previous to the decree in appeal, and that that decree was therefore infructuous. Their other objections as to the wassilat need not be considered, as nothing in this appeal turns upon it.

Both the Courts below, whilst holding it proved that Neel Monee was dead wh decree of the Appellate Court was pas favour of the defendants, consider tha Monee's sons, by their conduct in al the appellants to proceed in ignorance fact of Neel Monee's death, and by presence and defence of the original d have put themselves out of Court, and s not be allowed to benefit by their laches.

It appears that the sons made an a to prefer a special appeal to this against the Lower Appellate Court's d but were not allowed to do so on the g that they were not on the record, an not proved themselves to be heirs or sentatives of the deceased Neel Mone

Had Neel Monee's sons been both p when the case against their father was in appeal, it might perhaps have bee that they substantially, if not formally, sented the decree-holder; but this w the case. One son only was presen the other was not represented by the v for his powers had ceased with Neel M death, and he had got no fresh vakalu from the sons. The execution has allowed to proceed against the sons, b they, at the hearing of the appeal, fraudu kept back from the appellant the ledge that the decree-holder, Neel Mone dead; but the son who was not present trial could not have done so.

It may well be doubted, I think, w anything could make effectual a decree was passed against a deceased person, this case there is this further difficult Neel Monee's representatives (meani of them) cannot be said to have aid keeping the appellant in ignorance.

The only way of meeting the difficu it seems to me, is to direct the Subor Judge to try the appeal *de novo* after from the appellant evidence as to the of Neel Monee, the decree-holder, and the number and names of his represent and after having made these last p respondents in the appeal.

The result, so far as the decision in a is concerned, will probably be the sa before; but the respondents, the heirs of Monee, will not be debarred from pref a special appeal as they have been.

We must reverse the order of the C below, I think, but, under the circumsta without costs, and direct the Subord Judge to hear the appeal over again.

Mitter, J.—I am also of the opinion.

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The 27th January 1876.

Present:

he Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

uction-purchaser under Rent Law, s. 66—Under-tenures.

Case No. 2231 of 1874.

cial Appeal from a decision passed by he Judge of West Burdwan, dated the oth August 1874, affirming a decision f the Moonsiff of Bancoorah, dated he 16th September 1873.

aj Bullubh Mitter (Plaintiff), *Appellant,*

versus

reeram Sircar and another (Defendants), *Respondents.*

aboo Bamachurn Banerjee for Appellant.

aboo Nil Madhub Sen for Respondents.

he right, which an auction-purchaser has, under the nt Law, s. 66, to do away with under-tenures, cannot executed without a suit first having been instituted, mere fact of purchase being insufficient to set aside umbrances.

Glover, J.—THIS was a suit to set aside summary order given under section 246 the Code of Civil Procedure. The aintiff's allegation was that one Kartick owdhry, against whom he got a decree, ossessed certain mokurruree rights in the illage in question, and he wished to have hose rights sold in execution.

The defendant contended that, whatever artick's rights might have been, supposing e had any, they were extinguished by the efendant's purchase of the under-tenure of e original tenant in the zemindaree, *viz.*, uree Sunkur Mookerjee. By that purhase he acquired the tenure free of all incumbrances, was entitled to and had in fact ejected Kartick whose rights and interest the plaintiff wished to have sold.

The Lower Appellate Court has decided the question upon the rights which an auction-purchaser has under section 66 of the Rent Law to do away with the under-tenures, and has found moreover that the defendant Kartick was not a mokurrureedar as stated in the plaint, but that he held a sort of right which, by the custom of the district, was transferable. The right was called *jumai* right. And the Judge thought that such a right was by the Rent Law liable to be done away with at the option of an auction-purchaser. This was the only point decided in the case.

We do not think that the Judge's order is correct even so far as it goes, because granting that Huree Sunkur Mookerjee was the original under-tenant in the zemindaree, and that a purchaser at an auction-sale of his rights would be entitled to set aside any incumbrance made by Huree Sunkur Mookerjee without the written consent of his landlord, still, as has been held by frequent decisions of this Court, such a right could not have been executed without a suit first having been instituted. Such tenures as those made by Huree Sunkur Mookerjee would be voidable, but not necessarily void. The mere fact of the purchase would not be sufficient to set aside the incumbrances; the purchaser would have to bring a suit for the purpose.

But, before it becomes necessary to decide this question, we must first see whether Kartick, the defendant No. 2, and the judgment-debtor of the plaintiff, was in possession at the time of the attachment of the land which the plaintiff wished to have sold. If he was in possession at that time, then clearly there was something which the judgment-creditor who had a decree against Kartick would have a right to put up to sale in execution. This seems to us to be the point to which the Judge's attention should have been primarily directed. If Kartick was not in possession, then there was nothing to be sold. But, if he was, then there was something which the decree-holder could sell in execution of his decree, leaving the defendant No. 1 to take such steps as he might think proper to get rid of the under-tenure which Huree Sunkur Mookerjee is said to have made.

The case is remanded to the Judge to come to a decision on that point. Costs will follow the result.

The 28th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Execution-sale—Ancestral Property—Limitation.

Case No. 2278 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 18th July 1874, reversing a decision of the Moonsiff of Bolepore, dated the 21st March 1874.

Krishto Mohun Shaha (Plaintiff), *Appellant,*

versus

Bacharam Mookerjee (one of the Defendants), *Respondent.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Amarendro Nath Chatterjee for Respondent.

Where property was sold in 1867 as ancestral property in execution of a decree in respect of a debt due, the judgment-debtor's son cannot now sue to set aside the sale on the ground that the property was his self-acquired property, and not liable for the debts of his father.

Glover, J.—THERE is no ground for this special appeal. The deed on which the plaintiff brings the suit not having been registered does not operate as a mortgage-lien upon the property. His decree therefore was a simple money-decree, and before that decree was passed, the property against which the plaintiff wishes his decree to operate had been sold in execution of a decree against Jogeshur in respect of a debt due by Jogeshur's father, and was purchased by the defendant for valuable consideration. It is said that it has now been found that the property was the self-acquired property of Jogeshur. However that may be, it is clear that in 1867 this property was declared liable for the debts of Jogeshur's father, and Jogeshur allowed the sale of the property to proceed without making any objection to the legality or propriety of that order.

It is clear that Jogeshur could not now bring a suit to set aside the sale on ground that the property was his self-acq ed property, and not liable for the deb his father. *A fortiori*, the decree-ho who has got a money-decree against Joge eight years subsequent to the date of other decree on which the property sold, could not do so.

The appeal is dismissed with costs.

The 28th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Appeal—Objections—Issues.

Case No. 2053 of 1874.

Special Appeal from a decision passed the Judge of Bhaugulpore, dated 22nd May 1874, modifying a decision the First Moonsiff of Monghyr, dated 16th February 1874.

Toree Mahtoon and others (Plaintiffs), *Appellants,*

versus

Baboo Ram Sahoy Singh and others (Defendants), *Respondents.*

Mr. M. L. Sandel and *Moonshee Mahom Yusuf* for Appellants.

Mr. C. Gregory for Respondents.

A suit for enhancement of rent was defended on tw grounds, the first of which was overruled, but the seco succeeded, and the suit was dismissed. Plaintiff a pealed, and the second ground having been overrul in appeal, the respondent (defendant) again put fo ward the objection which had been overruled by th first Court:

HELD that, under the circumstances, it was not to late for him to take that objection.

Mitter, J.—WE think that the special appellant is entitled to have this case remanded upon the ground that the Lower Appellate Court has not tried the question

whether the tenure of the defendant is liable to enhancement or not. As regards this question the case stands thus:—

The defendant defended this suit upon two grounds:—

First, that the tenure being a mokurruree tenure and the rent not having varied for twenty years, the tenure was protected from enhancement;

And, secondly, that the rent claimed was not fair and equitable.

The Moonsiff who tried the case first, upon the first of these two questions, came to the conclusion that the defendant's tenure was liable to enhancement. But, upon the other question, he decided the case in favour of the defendant, and dismissed the suit.

There was an appeal preferred by the plaintiff, and upon that appeal the Judge thought that, upon the question of rent, the evidence before him was not sufficient to enable him to come to a satisfactory conclusion. He therefore remanded the case to the Moonsiff for further investigation.

The Moonsiff, upon remand, decided this question in favour of the plaintiff, and awarded him a decree.

Upon the case again coming up before the Appellate Court, the District Judge, with reference to the objection of the defendant as to the liability of his tenure to enhancement, says that it was too late for the defendant to take this objection before him, and upon that ground he refused to enter into it.

We think that he is not right in declining to enter into the question. The suit of the plaintiff stood dismissed by the original judgment of the Moonsiff; and so long as the judgment of dismissal was in favour of the defendant, he might not have considered it necessary to raise the other question, namely, whether his tenure was liable to enhancement or not. But so soon as the judgment passed in his favour upon the question of rent was found not sustainable, he at once put forward this objection before the Appellate Court. We think, under the circumstances stated above, it was not too late for him to take that objection. We therefore think that there has been a defect in the investigation of the case, inasmuch as the Judge has not given his opinion upon this question which the special appellant was entitled to raise before him. We therefore remand this case to the Lower Appellate Court for an adjudication upon this question.

Costs will abide the result.

Glover, J.—I concur.

The 29th January 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Execution of Decree—Priority of Decree carrying Lien—Double Sale—Special Decision not having General Force.

Case No. 117 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of Tipperah, dated the 30th September 1874, reversing a decision of the Additional Moonsiff of Amirgaon, dated the 6th August 1873.

Mahomed Danish (Plaintiff), *Appellant,*

versus

Mahomed Kaem and another (Defendants), *Respondents.*

Baboo Oomesh Chunder Banerjee for Appellant.

Baboo Sreenath Banerjee for Respondents.

A talook belonging to J was first purchased by R K at a sale in execution of a money-decree, and again purchased by C M in execution of a decree which gave the benefit of a mortgage. As purchaser of a share of C M's rights, M D brought a suit for rent against M K, who pleaded that he had paid the rent to R K, who intervened, asserting his title as purchaser, and alleging actual possession. The Judge decided on 9th August, 1872, that the decree under which C M purchased gave him priority over R K. In special appeal, the defendants rejoined that this decision had been practically set aside by the High Court having decided that the decree under which C M purchased was simply a money-decree carrying with it no lien.

As this decision of the High Court was made in another suit between different parties which related to other lands sold under the decree under which C M purchased, it was HELD that it could not affect the plaintiff's position, and that the decree of the 9th August 1872 remained in full force, and must be executed.

Macpherson, J.—IN this suit it appears that Jugodeswari owned a certain talook known as No. 42-1, and some other talooks also.

In 1275, that talook No. 42-1 was purchased by the respondent, Ram Kumar, at a sale held in execution of a decree against Jugodeswari. Subsequently, at a sale held in execution of another decree against Jugodeswari,

talook 42-1 was again sold, and was purchased by one Chowdhry Manji.

The plaintiff sued the respondent Mahomed Kaem for rent of some of the lands of talook 42-1, alleging that he (the plaintiff) had purchased a four-anna share of Chowdhry Manji's rights in these lands. The defendant pleaded that he had paid the rent to Ram Kumar, who was entitled under his purchase in 1275 to receive it; and Ram Kumar intervened in the suit, asserting his title as purchaser, and alleging himself to be in actual possession under that title.

The plaintiff's case is, that his title is better than Ram Kumar's, because Chowdhry Manji purchased under a decree which gave him the benefit of a mortgage of these lands, and which entitles him to priority, although the sale at which he purchased is later in date than that at which Ram Kumar purchased. The plaintiff, moreover, says that the question has been already conclusively decided as between himself and Ram Kumar in another suit. That suit related to other lands forming part of talook 42-1; Chowdhry Manji and Ram Kumar were parties; and the Judge, on the 9th of August 1872, decided that the decree under which Chowdhry Manji purchased gave the purchaser the benefit of a prior mortgage, and, therefore, gave him priority over Ram Kumar, who purchased under a common money-decree.

But to this the respondents rejoin that, although the decree of the 9th of August 1872 has never been formally reversed, it has been so practically by a decision of the High Court to the effect that the decree, under which Chowdhry Manji purchased, was nothing more than a simple decree for money, and carried no lien of any sort with it. The High Court so decided in another suit between different parties, which related to other lands sold under the decree under which Chowdhry Manji purchased. This was on the 18th of February 1873; and the High Court did then, no doubt, decide, as between the parties before it, that the decree in question did not give purchasers under it the benefit of the prior mortgage.

Both the lower Courts were at first of opinion that the District Judge's decision of August 9th, 1872, being between the same parties, concluded the question; and they decreed accordingly in favour of the plaintiff. But the Subordinate Judge subsequently changed his mind, and, having granted a review of his judgment, held that the District Judge's decision was not conclusive, as the later decision of the High C showed it was wrong.

But the parties to the present suit we parties to the case which came in appeal b the High Court. That being so, the plai position cannot, in our opinion, be affecte the decision of the High Court. Ri or wrongly, the District Judge's dec and decree of the 9th of August remain unreversed and in full force; an cannot refuse to give effect to them.

The District Judge, in his judgmen the 9th August 1872, relies on a prev decision of his own in another case; an states that the date of that decision was 19th of August 1871. The respond pleader asserts that the decision thus refe to is the very one which was brought here in appeal, and was declared by High Court to be wrong on the 18th Feb ary 1873. But there is nothing to s that this is so. A reference to the record, remaining here, of that appeal, which decided on the 18th February 1873, sh that the decree appealed against was da the 14th of August 1871. So that, as the c stands before us, it is impossible to say the District Judge's original decision August 19th, 1871 (to which he refers in later judgment of August 9th, 1872), ever in fact reversed.

But, even if it were proved to have b subsequently reversed, it seems to us would not benefit the respondents. For t original decree of the 9th August 1872 s remaining in force, we are bound to gi effect to it, and to say that it concludes t question as between these parties.

It may or may not be that the decision August 1872 ought to have been revers when the ruling of the High Court in t other case became known. But with that have nothing to do. So long as the decre of August 9th, 1872, remains in force, are bound to give effect to it in the sam way as to any other decree.

Taking this view of the case, we thi that the Subordinate Judge was wrong i reviewing and reversing his decision of th 9th of March 1874.

The question remains as to what decre we ought to make now. The original an only defendant was Mahomed Kaem, who wa sued for rent as being the tenant in actua possession. Ram Kumar chose to intervene, and in his written statement declares he has received all the rent, and is alone entitled to it. The Lower Appellate Court finds as a fact that Ram Kumar has received from the

ll the rent claimed in this suit. Ram ar having of his own free will become a dant, and being found by the Subordi- Judge to have received "the entire of the period in suit," it seems to us e now is liable, as well as the other dant (the actual tenant), to make it good plaintiff.

e reverse the Subordinate Judge's e and give judgment in favour of the tiff for the amount claimed in the plaint st Ram Kumar and the original defend- and the appellant (plaintiff) is also ed to have from them his costs in all ourts.

The 2nd February 1876.

Present:

Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

sne-profits—Splitting a Cause of Action.

Case No. 1628 of 1874.

ial Appeal from a decision passed by the ficiating Judge of Sylhet, dated the 24th pril 1874, affirming a decision of the Sub- dinate Judge of that District, dated the th August 1873.

Ruttun Audo and others (Defendants), *Appellants,*

versus

n Chunder Pal and another (Plaintiffs), *Respondents.*

Ghose and *Baboos Nullit Chunder Sen Bharut Chunder Dutt* for Appellants.

boos Hem Chunder Banerjee and *Joy Gobind Shome* for Respondents.

suit for possession, in which mesne-profits are ssly prayed for, the plaintiff is bound to put for- his whole claim for such profits, and is not entitled erve a portion to be made the subject of another

acpherson, J.—THIS suit is barred r section 7 of the Civil Procedure , being in respect of a claim arising out e same cause of action as that which the subject of a former suit, so far as atter was a suit for mesne-profits.

the former suit, the plaintiffs sued for ession and also for mesne-profits from the of commencing that suit until they ld actually get possession. And they ned a decree accordingly.

Now they sue for mesne-profits for the time prior to the institution of that suit. The appellants contend that this suit ought to be dismissed under section 7 because the present claim is, in fact, a part of the claim for mesne-profits, a portion of which claim was asserted by the plaintiffs and was dealt with in the former suit.

We think that this is so. There is no doubt that, under section 10, a claim for the recovery of land, and a claim for the mesne-profits of the land, are distinct causes of action. And it is true that section 196 authorizes the Court in a suit for land to give a decree not only for possession, but for mesne-profits from the date of suit, even though mesne-profits are not specially prayed for in this suit.

But in the instance before us, the plaintiffs distinctly made mesne-profits one of the subjects of the former suit, and expressly prayed in their plaint that mesne-profits might be given to them for a period which they indicated. Having done that, they ought to have put forward then their whole claim for mesne-profits, and were not entitled to reserve the portion now sued for and to make that portion the subject of another suit. A decision reported in Weekly Reporter 1864, page 298, is quoted as an authority in favour of the plaintiffs. But that case is not in point; because there (as is expressly stated in the judgment) the Court awarded the wassilat though the plaintiff did not ask for it. The plaintiffs now before us did, in their former suit, expressly sue for mesne-profits, which makes the two cases very different.

We set aside the decree of the Lower Appellate Court and dismiss the plaintiffs' suit as against all the appellants before us.

We may add that we have very little doubt that the whole of this litigation has been wrongly framed, and that if these suits had been properly conducted in the Court of first instance, the plaintiffs never could have succeeded either in the former or in the present suit. The circumstances must be indeed very special and peculiar and the evidence very distinct and strong which would warrant a decree for possession, or a decree for mesne-profits against some 130 defendants, when, in fact, each (or almost each) of these defendants held a separate parcel of the land claimed and had no interest against the plaintiffs, save as regards his own particular plot of land.

The appellants are entitled to their costs here and in the Court below.

The 2nd February 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Terminable Lease—Right of Occupancy.

Case No. 2610 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 19th August 1874, reversing a decision of the Moonsiff of Kishengunge, dated the 29th May 1874.

Shaikh Ebadutoollah (Plaintiff), *Appellant*,

versus

Shaikh Mahomed Ali and another (Defendants), *Respondents*.

Moonshee Mahomed Yusuf for Appellant.

Baboos Rajendro Nath Bose and *Taruck Nath Paleet* for Respondents.

Where a lease contained a provision to the effect that, at the expiration of the term, the landlord should be at liberty to enter into a settlement with any one he pleased, and so put an end to the lessee's tenure, and the landlord, notwithstanding, allowed the tenant to continue his occupation paying rent as before, HELD that, under the circumstances, there was nothing in the stipulation itself which operated to negative or destroy the tenant's right of occupancy.

Garth, C.J.—WE think that the decision of the Subordinate Judge is perfectly correct. He has found, as a fact, that the defendants and their ancestors have been in possession of the disputed land as jotedars for upwards of twenty years, renewing from time to time the engagement under which they held it; and they are, no doubt, entitled *primâ facie* to a right of occupancy.

But then the plaintiff says, that, in the month of Kartick 1275, the defendant, Mahomed Ali, took a lease from him of the land for three years, and that there was an express provision in that lease, that, at the expiration of the term, the landlord should be at liberty to enter into a settlement with any one he pleased, and so to put an end to the defendants' tenure.

This, the plaintiff contends, is an express stipulation within the meaning of section 7 of Act VIII. (B. C.) of 1869, which is contrary to, and destructive of, the defendants' right of occupancy.

That provision is nothing more than law would imply in the case of every le and is one which the landlord was at lib to avail himself of or not as he plea But the Judge has found that in instance he did nothing of the kind. allowed the defendants to continue th occupation, paying rent as before; and think that, under those circumstances, th was clearly nothing in the stipulation itsl which operated to negative or destroy defendant's right of occupancy.

The appeal will, therefore, be dismis with costs.

The 3rd February 1876.

Present:

The Hon'ble A. G. Macpherson and G. Morris, *Judges*.

Landlord and Tenant—Acquiescence.

Appeal under section 15 of the Lett Patent from the decision passed by Hon'ble W. F. McDonell, one of Judges of this Court, dated the July 1875, in Special Appeal No. 26 of 1874.*

Muddun Mohun Roy Chowdhry (one of Defendants), *Appellant*,

versus

Chunder Sekhur Bhuttacharjee and anoth (Plaintiffs), *Respondents*.

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* The 29th July 1875.

Present:

The Hon'ble W. F. McDonell, *Judge*.

Case No. 2674 of 1874.

Special Appeal from a decision passed by the Add tional Judge of Furreedpore, dated the 24th Jul 1874, reversing a decision of the Moonsiff of Bhang dated the 7th April 1874.

Modun Mohun Roy Chowdhry (one of the Defendants), *Appellant*,

versus

Chunder Sekhur Bhuttacharjee and another (Plaintiffs), *Respondents*.

Baboos Kalee Mohun Dass and *Chunder Madhu Ghose* for Appellant.

Baboos Rash Behary Ghose and *Kashee Kant Sein* for Respondents.

ON this case being taken up, a preliminary objection was raised that, under section 102 of Act VIII. (B. C.) of 1869, no appeal lay; but as it appears that as between

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Mr. R. T. Allan and *Baboos Ashootosh Dhur* and *Kalee Mohun Doss* for Appellant.

Baboos Rash Beharee Ghose, Kumla Kant Sen, and *Kashee Kant Sen* for Respondents.

A tenant cannot afterwards be held liable for rents which he pays to a third party (co-sharer) with the acquiescence of his landlord, expressed or implied; and where the relation of landlord and tenant ceases with the consent of the landlord, the landlord cannot again claim rent unless he shows how or when the relation revived.

Macpherson, J.—We think in this case that the judgment appealed against must be reversed, and that the decision of the District Judge must be set aside, and the case remanded to the Court of first instance, in order that that which is the real issue in the suit may be decided.

The Courts seem to us to have rather lost sight of the real point they had to determine, namely, whether the ryot, who was sued for rent, was the ryot of the plaintiff, and liable to pay him rent. The ryot, in his written statement, distinctly pleads that he is not a tenant of the plaintiff, and that is his real defence, though he unfortunately for himself goes on in his written statement to explain how he ceased to be the plaintiffs' tenant, by entering into details as to an arrangement of the plaintiff with one Anund Moyee, under which the rent became payable and was, in fact, thenceforth paid to Anund Moyee.

Now, there seems to be no doubt that, for years past, the rents have been paid by the ryot-defendant to Anund Moyee and not to the plaintiff: and the real issue to be tried is, whether, during the time for which the rent which is sought to be recovered in this suit, the ryot-defendant was the ryot of the plaintiff. The question is not whether the ryot can prove the terms of the butwarra between Anund Moyee and the plaintiff, but whether the plaintiff can prove that the ryot-defendant is now his tenant and bound to pay rent to him (the plaintiff). In order to ascertain this, the Court must decide distinctly for how many years the ryot-defendant has, as a matter of fact, paid the entire rent of the tenure to Anund Moyee. Another issue will be, whether the rents paid to Anund Moyee were paid to her with the consent or acquiescence of the plaintiff, and when did the plaintiff first object to the rents being paid to Anund Moyee. If the rents were, in fact, paid with the plaintiff's consent to Anund Moyee for many years, the plaintiff must show on what ground it is that he contends that, at this present time, the relation of landlord and tenant subsists between him and the ryot-defendant. If the relation of landlord and tenant ever ceased by the consent of the plaintiff (at the time that the ryots began to pay rents to Anund Moyee, or otherwise), how or when did it become revived.

It is a mistake to suppose that, because the ryot admits that he, or those under whom he claims, once upon a time many years ago paid rent to the plaintiff, the relation of landlord and tenant is thereby admitted to exist now. The case really turns much more upon the conduct of the parties during recent years than upon any question as to the terms of the agreement which is said to have been entered into between the plaintiff and Anund Moyee. It, by no means, follows that, because the ryot-defendant cannot prove that agreement, he is, therefore, liable to the plaintiff for the rent now sued for. He is not liable for the rent, if it be true that he has (as alleged by him) paid the rent to Anund Moyee with the plaintiff's consent. Whatever the position of Anund Moyee and the plaintiff may be, the ryot-defendant cannot be held liable now for any money which he paid to Anund Moyee with the acquiescence, expressed or implied, of the plaintiff.

The case will have to go back to the first Court for re-trial, the parties being at liberty to adduce fresh evidence.

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the plaintiff and the intervenor a question of right or title to land has been determined by the judgment, this objection cannot prevail. In special appeal it is observed that the grounds on which the Lower Appellate Court has found that the exchange has not been made out, are not sufficient and correct, but the reasons which have been given by the Judge for arriving at this finding cannot be questioned in special appeal. The Judge has decreed the appeal with costs and interest at 6 per cent., but it is clear that, in giving a decree for the full amount, he has made a mistake, in that, in the commencement of his judgment, he says: "There seems to be no dispute "that the whole rent is Rs. 23 as. 12 gds. 5 as stated "by the defendant, and not Rs. 26 as. 8 gds. 5½, as "stated by the plaintiff," and this would reduce the plaintiffs' claim proportionately. This error in the decree will be accordingly amended, but the appeal must be dismissed with costs.

The 8th February 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Joint Hindoo Family—Ancestral Property—Partition.

Case No. 635 of 1874.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 29th December 1873, affirming a decision of the Moonsiff of Begusurai, dated the 29th April 1872.

Shaikh Sherajooddeen Ahmed and others (Defendants), *Appellants,*

versus

Horel Singh (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Moonshee Mahomed Yusuf* for Appellants.

Baboo Kali Kissen Sen for Respondent.

The fact that one member of a joint family is separate in residence and mess, in no way affects his position as to his ancestral property until a separation in estate has taken place.

Macpherson, J.—THE plaintiff in his plaint states that he is separate from his father and brother in residence, food, and business. He also states in his plaint that he is entitled to recover possession of his share by partition. As he finds it necessary to sue for a partition, it is clear that no partition or separation in estate has yet taken place. And. in fact, it is not disputed that the plaintiff is joint in estate with his father and the other members of his family, although it may be true that he does not reside with them or eat with them, and that he transacts certain business separately.

If he is joint as regards the ancestral estate, then this case falls within the principle of the decision of the Privy Council in the ca Girdharee Lall *versus* Kantoo Lall Weekly Reporter 56). The fact that member of the family is separate in resid and mess, in no way affects his position the ancestral property, until a separatio estate has taken place.

It is clear that the present case mus governed by the decision of the Privy C cil just referred to. The original debt i shown to have been incurred for any im per purpose, and the property which is subject of suit was sold to save the re the estate.

The decree of the lower Courts mus reversed, and the plaintiff's suit dismi with all costs.

The 8th February 1876.

Present:

The Hon'ble F. A. Glover and Romes Chunder Mitter, *Judges.*

Unstamped Pottah—Evidence—High Co Powers.

Case No. 231 of 1874.

Regular Appeal from a decision pas by the Judicial Commissioner of Loh dugga, dated the 21st May 1874.

Dewan Koonjo Lall and others (Defendant *Appellants,*

versus

The Court of Wards (Plaintiff), *Respondent*

Mr. R. T. Allan and *Baboo Luckhee Chur Bose* for Appellants.

Baboo Unnoda Pershad Banerjee for Respondents.

Where a jagheer pottah, tendered as evidence by th defendant, was rejected as not being properly stamped

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any formal order to that effect or any direction n the stamp-fee and fine, the High Court ed that it ought to interfere and to order that ndant be permitted to put in the amount due p-fee and fine.

per, J.—THERE is nothing on the to show that the defendant's vakeel otice that this jagheer pottah would ected unless properly stamped, and e under Act X. of 1862 paid.

issues were fixed on the 13th y 1874; the evidence was taken on and 18th of May of that year; the was rejected on the 20th of the . There is no formal order rejecting ny direction to the defendant to pay stamp-fee and fine.

hardly probable that the defendant, oing to so much expense in defend- e suit, would have hesitated at paying all amount (Rs. 10-8 annas) due as fee and fine, had she been duly in- d that such payment was necessary.

Judicial Commissioner, no doubt, in his judgment, that permission to the amount was given and not taken age of, but there is nothing on the to show this, and no formal order ere recorded.

s is a case, we think, in which we ought rcise the powers conferred upon us , and to order that the defendant be ted to put in the amount due as stamp- d fine.

this will necessitate a further enquiry e genuineness of the pottah. The al Commissioner is requested to take s part of the case *de novo*, and to e the witnesses produced by the ant in support of the grant of the to Golemerich, giving at the same n opportunity to the plaintiff to rebut vidence if it be thought expedient to

appeal will remain on the file of this and the case will be disposed of on of the additional evidence now d to be taken. The Judicial Com- ner is requested to return the record Court as soon as possible.

The 9th February 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Indigo Concerns—Firms—Right of Occupancy.

Case No. 784 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of Rajshahye, dated the 25th January 1875, affirming a decision of the Moonsiff of Pubna, dated the 5th September 1874.

H. H. Cannan, Liquidator, Agra and Masterman's Bank (Defendant), *Appellant,*

versus

Kylash Chunder Roy Chowdhry (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Bhoobun Mohun Dass for Respondent.

An "Indigo Concern" or "Firm" has no corporate or legal existence so far as the question of a right of occupancy is concerned, which can only be recognized in particular individuals.

Macpherson, J.—As regards the first ground of appeal, we think that there is nothing in it. It may be, or it may not be, that Mackilligan had acquired a right of occupancy in this land. But it is clear that the Agra Pank, which has been in possession only some six or seven years, cannot, merely as transferee of Mackilligan's interest, and relying on his previous possession, have any right of occupancy, unless the Bank's landlord has admitted that it has such a right.

We are asked to declare that the Agra Bank has a right of occupancy as standing in the place of a certain Indigo Concern, which held this land for more than twelve years. But an "Indigo Concern" or "Firm" has no corporate or legal existence which we can recognize in a suit like this. So far as the question of a right of occupancy is concerned, all that we can look at is occupancy by particular individuals; and as far as such occupation of this land goes, the present appeal fails.

As regards the other two points, no doubt, the questions referred to have not been decided by the Lower Appellate Court. Nevertheless, the appellant is not entitled to have the case remanded: for he has not given such evidence as it was absolutely necessary for him to place before the Court in order to prove that the Bank has a lien on the land in respect of Rajkisto's alleged mortgage and the payment of revenue, said to have been made to save the land. The appellant has not proved this part of his case properly. No Court could decide the question as to the lien for Rs. 200 without the original bond being put in, on which the annual payments of Rs. 50 were to be endorsed.

The appeal is dismissed with costs.

The 9th February 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Dissolution of a Firm—Death of Proprietors—Suit by Agent.

Case No. 1326 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 20th February 1875, reversing a decision of the Sudder Moonsiff of that District, dated the 22nd July 1874.

Gossain Gunga Dutt Bharutee (Defendant), *Appellant,*

versus

Dabee Dass Baboo (Plaintiff), *Respondent.*

Baboos Issur Chunder Chuckerbutty, Rash Beharee Ghose and *Kishoree Mohun Roy* for Appellant.

Baboos Sreenath Dass and *Mohinee Mohun Roy* for Respondent.

A firm becomes dissolved when the original proprietors die, and if somebody comes in their place and carries on the business of the firm, the business, whether carried on under the old name or not, is not that of the old firm, but of an entirely new firm:

A suit brought on behalf of such new firm s brought in the names of the persons who are at carrying on its business.

Macpherson, J.—In this case the p iff, Dabee Dass Baboo, sues as "gom of the estate of the late Kandaree Duli Chand."

The first point raised by the defe in his written statement was, that th being avowedly brought by an agent, w not lie in the absence of the princi "As Kandaree Mull Duli Chand died "ago, and Dabee Dass Baboo is a ser "this suit cannot proceed in the absen "the principal plaintiffs."

The same objection was pressed a hearing before the Moonsiff. But it overruled. The Moonsiff says in his ment: "The defendant objects that "plaintiff, Dabee Dass Baboo, has adm "in this case that both the proprieto "the firm, Duli Chand and Kandaree "are dead, and, consequently, Dabee "cannot now be their manager. The "of Duli Chand Kandaree Mull is a fa "one, and the firm is very rich. * * A "cannot be dissolved if the original pro "tors are dead; for somebody comes in "place and carries on the business o "firm, and in many cases the new prop "keeps the former name of the firm. "The death of Duli Chand and Kand "Mull is perfectly immaterial in this "as it is publicly known in the whole "of Rampore Beauleah, that the pr "plaintiff is the manager of the fir "Duli Chand Kandaree Mull, &c."

The question being again raised in a before the Subordinate Judge, he affi the Moonsiff's decision. He says: " "reading the top of the plaint, I s "clearly that the plaintiffs actually "are Kandaree Mull and Duli Chand; "Dabee Dass Baboo is only a gomash "the firm and estate of Kandaree "Duli Chand, which firm still goes on "that name, though the individuals in w "name the firm was first opened have "since been dead. The suit is on be "of Kandaree Mull Duli Chand, w "agent is Dabee Dass Baboo, having "beneficial interest in the subject-ma "of suit. The suit is not brought in "agent's own name but in the name of "principal, so I think there could be "reasonable ground for the first contentio

Nothing can be more inaccurate or wr than the views expressed by the Judges both the lower Courts. There can be

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ubt whatever that a firm *is* dissolved "if the original proprietors are dead;" and t if (to use the language of the Moonsiff) "somebody comes in their place and ries on the business of the firm," the siness, whether carried on under the old me or not, is not the business of the old m, but of an entirely new firm. The death Duli Chand and Kandaree Mull is *not* rfectly immaterial in this case (as the oonsiff says it is), for this simple reason, for no other, that, if the defendant incurd liability to Duli Chand and Kandaree ull, he may be bound to satisfy them or eir legal representatives, but he is not ound to satisfy any one else, and therefore annot be successfully sued by any one who annot prove himself to be the legal reresentative of Duli Chand and Kandaree ull. As to the Subordinate Judge's mark that the suit is not brought in the gent's own name, but in the name of the rincipal, it is hard to see how this improves e position, when the Subordinate Judge imself finds that the principals in whose me the suit is instituted were dead long fore the plaint was filed. Dead men canot institute suits, nor can they have agents r the purpose of instituting suits for them.

On the facts as stated in the plaint and as ound by the Subordinate Judge, it is clear at the suit is not properly framed, and ust, therefore, be dismissed. If Dabee Dass Baboo wishes to assert any right gainst the defendants, he must consider in hom the right which he desires to assert now vested. If he finds it is vested in e persons who are at present carrying on usiness under the style or firm of Kandaree Mull Duli Chand, whose agent he is, then it is in the names of those persons that the uit must be brought.

We think that Dabee Dass Baboo having sued on behalf of the firm, the suit fails, because it is not instituted by those persons who now, so far as the subject-matter of this suit is concerned, represent Kandaree Mull and Duli Chand with whom the original transaction took place. But we think the suit would have equally failed if Dabee Dass Baboo had sued in his own name, and not as agent of the late firm: because, on reference to the mortgage-deed, which is the foundation of the suit, it appears that the mortgage was to "Kandaree Mull Duli Chand, on their behalf Dabee Dass," being in truth (as the parties have throughout this suit treated it) a mortgage to Kandaree Mull and Duli Chand.

The objection to the form of the suit is a substantial objection, and has been urged by the defendant at every stage of the suit. That being so, we are bound to give effect to it now.

Therefore, on the ground that the suit is not rightly framed, and the proper parties are not suing, we reverse the decrees of the lower Courts, and dismiss the plaintiff's suit with costs in all the Courts; and we declare that Dabee Dass Baboo is personally liable for the payment of these costs.

The 9th February 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Sale by Debtor—Fraud.

Case No. 1365 of 1875.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 15th April 1875, affirming a decision of the Moonsiff of Soodharam, dated the 17th April 1874.

Chunder Madhub Doss (Plaintiff), *Appellant,*

versus

Ameer Ali and others (Defendants), *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Sreenath Banerjee for Respondents.

The mere existence of creditors does not make it necessarily fraudulent on the part of the debtor to sell his property, if he does really sell it for valuable consideration.

Macpherson, J.—The judgment of the Lower Appellate Court is insufficient in not distinctly deciding whether the transfer by Parbuttee actually passed the property out of him into the alleged purchaser.

The Judge has stated that the transaction is full of suspicion, and was fraudulent and collusive; but he does not show in what particular sense he uses the terms "fraudulent" and "collusive;" and he so expressed himself that it is open to the appellant to argue that it has been decided, either expressly or impliedly, that the transaction

was merely a paper-transaction, and did not pass the property out of Parbuttee. The fact that there were other creditors (if any such there were) has nothing to do with the matter, if in truth he sold the property in the manner alleged, and executed a conveyance by which he really transferred the property to the purchaser. The mere existence of creditors does not make it necessarily fraudulent on the part of the debtor to sell his property, if he does really sell it for valuable consideration. The case must be re-tried. We express no opinion as to whether there was a real transfer of the property from the apparent vendor to the purchaser. We remand the case that this may be expressly decided.

Costs will abide the result.

The 14th February 1876.

Present :

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Decree—Execution.

Case No. 225 of 1875.

Miscellaneous Appeal from an order passed by the First Subordinate Judge of Rajshahye, dated the 25th March 1875, affirming an order of the Moonsiff of that District, dated the 20th March 1874.

Rooknee Kant Chowdhry and others (Judgment-debtors), *Appellants,*

versus

Nund Lall Chowdhry and others (Decree-holders), *Respondents.*

Baboos Mohinee Mohun Roy, Issur Chunder Chuckerbutty, and *Tarinee Kant Bhuttacharjee* for Appellants.

Baboos Bhoobun Mohun Dass and *Do Mohun Dass* for Respondents.

Where a decree only declared plaintiff's passing through a doorway, and to remove the work with which it was filled, HELD that, in ex it, the decree-holder was not authorized to re wooden door in existence there.

Macpherson, J.—WE think that the ordinate Judge was wrong in decidin the wooden door ought to be removed, out further inquiry than has been made the circumstances under which that door to be there.

The decree which they obtained establ ed the right of the plaintiffs to have brick-work with which the doorway filled up removed; and also established right of way through the doorway, d ing their right of egress and ingre pleasure.

If the wooden door is new, if it wa in existence at the time when the plai suit was instituted, then the order of Subordinate Judge is right. If, on other hand, a wooden door was in exis at that time, then, although the de holders have a right to pass through doorway, and to insist upon the remov the brick-work, they have no rig remove the wooden door. If the wo door was in existence, and it was inte that it should be removed, it should been expressly so directed in the de The decree being silent on the subject plaintiffs can insist on the removal of brick-work only. Of course under decree the plaintiffs, whether the wo door was there or not when the suit instituted, are entitled to pass through times at their pleasure; and in no can the wooden doors be lawfully use as to obstruct the plaintiffs in passing re-passing at pleasure through the door But if the wooden door was in exis when the suit was instituted, then the o for its removal is bad, and must be aside.

The matter is remanded for fur inquiry on this point, and the costs of appeal will abide the result of the inq now ordered.

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The 11th January 1876.

Present:

r James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

stamentary Disposition—Conditions recorded . therein valid.

Appeal from the High Court of Judicature, North-Western Provinces, Allahabad.

Mahomed Altaf Ali Khan

versus

Ahmed Buksh and others.

Where a testatrix devises a certain disposition of her ole property in the course of a wajib-ul-urz relating only a portion of it, and independent testimony of intention to make this disposition was produced, LD that the disposition was valid against a claim for session set up by a rival claimant.

THE point in this case is a very short one. he plaintiffs claimed under a will of Musmut Bunnoo Jan, who is admitted on both les to have been the owner of the property question, and to have had power to dispose it by will. The defendant's claim was nply that of possession.

It is admitted that, by the Mahomedan w, no writing is required to make a will id, and no particular form even of verbal claration is necessary as long as the ention of the testator is sufficiently ascerned. In the first place, the plaintiffs put a certain power-of-attorney executed by testatrix to one Kishoon Lall to make at is called a wajib-ul-urz, and this docuent is to this effect: That a new settlement ving been made of the property, this lady de her appearance in respect of one ouzah Ismaeelpore, and she directed a jib-ul-urz to be made in respect of that uzah. But then she goes on to say the jib-ul-urz is to contain an alienatory use to the effect: "After my demise Ahmed Buksh shall be the proprietor of one moiety of my property, and Mussamut Nujmoonnissa, my adopted daughter, the proprietress of the other moiety." Now, it s contended that, although these words of mise in themselves extended to the whole the property of the testatrix, still the ope of this document must be limited to ouzah Ismaeelpore, to which, in the beginng, it particularly refers, and, if this docuent stood alone, there might possibly have been some question on this subject. But there was also verbal evidence to the effect that the testatrix did express an intention that the whole of her property should be devised by will to the plaintiffs, and as far as their Lordships understand the judgment of the Judge of the Subordinate Court, that Judge appears to have believed the evidence, because he came to the conclusion that it was the intention of the lady to give the whole of her property, though he thinks she has not carried that intention into effect. Accordingly his judgment was, that her testamentary disposition only took effect with respect to Mouzah Ismaeelpore. That decision was reversed by the High Court, on the ground that it appeared from the evidence in the case generally, consisting partly of this document and partly of verbal evidence which seems to have been credible, that the lady intended to devise the whole of her property to the plaintiffs.

Their Lordships are of opinion that the High Court was right in that conclusion, and they will, therefore, humbly advise Her Majesty to confirm the judgment of the High Court, and to dismiss the appeal with costs.

The 18th January 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Judge's Statement of Facts not Evidence—Responsibility of Manager of Joint Estate—Error in institution of Suit not fatal.

Case No. 213 of 1874.

Regular Appeal from a decision passed by the First Subordinate Judge of Mymensingh, dated the 16th July 1874.

Thomas Kallonas (one of the Defendants), *Appellant,*

versus

Gunga Gobind Roy Chowdhry and others (Plaintiffs), *Respondents.*

Mr. C. Gregory and *Baboos Kalee Mohun Doss* and *Ram Churn Mitter* for Appellant.

Baboos Mohinee Mohun Roy and *Bykunt Nath Doss* for Respondents.

Unless examined as a witness, a Judge's statement as to facts within his knowledge cannot be used as evidence in a cause which he is trying.

Where several persons, who had purchased different shares of an estate, sued the manager to account for his management, and it was pleaded that the suit should be dismissed, the High Court, in regular appeal, although the suit had not been rightly framed, refused to dismiss it, as the plaintiffs were in joint possession; and the fact of their suing together did the defendant no injustice, and as expense had been incurred, and if the plaint were now dismissed, the plaintiffs would probably be barred by limitation.

Macpherson, J.—It is clear that this decree cannot be supported.

The plaint is so confused, and altogether so badly framed, that it ought never to have been received by the Court. But substantially the plaintiff's case is that they and the defendant Kallonas (the present appellant), and one Ram Kishore Acharjee amongst them, bought a certain estate from Messrs. Wise and Carnegie of Dacca; that each bought a share separately under different kobalas or bills of sale; the plaintiff Deno Nath Chuckerbutty buying a two-anna share, the plaintiffs Gunga Gobind and Joy Gobind three annas between them, the plaintiff Huri Kishore Roy two annas, the defendant Kallonas two annas, and Ram Kishore Acharjee eight annas; that the purchase took place on the 29th Assin 1279 (being the 14th October 1872), but, by the terms of the *kobalas*, it was to have effect from the 1st of Bysack preceding (the 12th of April 1872), from which date all the rents and profits were to belong to the purchasers; that, at and before the time of the purchase, the defendant Kallonas was managing the property on behalf of Messrs. Wise and Carnegie, the vendors; that, on the purchase being made, Kallonas continued to be the manager on behalf of the plaintiffs and of the other purchasers (including himself); that Kallonas continued in possession as manager until the 7th Falgoon 1279 (the 17th February 1873), when the plaintiffs dismissed him from his office of manager on their behalf; that as such manager Kallonas is bound to account for his management to the plaintiffs in respect of their shares from the date of their purchase up to the end of the following Magh (being about four months); that, as he was manager for Wise and Carnegie during the six months preceding the purchase, he is bound to account in respect of those six months also, as, by their purchase-deed, they are entitled to share in the profits of that period; that the purchase of Wise and Carnegie included a boat, some furniture, and other personal property, which Kallonas appropriated, and has never accounted for in any way. And the plaintiff sought to have an account taken, and to obtain an order for payment of what should be found d them, and for damages in respect o personal property and in respect of sustained by reason of Kallonas having to make over the usual zemindaree p &c., to them, whereby they had been vented from collecting their rents, &c.

Such is the nature of the plaintiffs' though it is set forth in the plaint scarcely intelligible fashion. It shoul added that there are four defendants be Kallonas, these being sued because acted as naibs and tehsildars and the under Kallonas in the management o property.

Kallonas denies that he ever was plaintiffs' manager, and altogether denie liability to them in respect of any of alleged causes of action. He also p that the plaintiffs ought not to have jointly, their interests being separate in no respect joint; and further th suit will not lie against him and the defendants together.

So much of the suit as relates to th months prior to the 29th Assin 1279 date of the purchase) is no doubt bad. plaintiffs may, or may not, have a against Messrs. Wise and Carnegie as re the profits realized during that period. as Kallonas was, according to the plai own story, only the manager of Wise Carnegie, he cannot possibly be liable any default made by Wise and Carnegi carrying out the contract into which entered with the purchasers, unless privity is established in this matter bet him (Kallonas) and the purchasers. admitted that there is no privity what except what arises from the fact that, du those six months, he was the ma employed by Wise and Carnegie. But c his having been so employed does not c any privity between the plaintiffs and Therefore that part of their suit is bad, must be dismissed. If Kallonas is not li of course the other defendants who wo under him are equally little liable.

The issue as to the period of about months subsequent to the purchase and ing with the month of Magh was sufficie simple, and might have been very easily speedily disposed of had it been tried reasonably practical manner. Instead, h ever, of examining the defendant Kallo who said he never managed for the plaint (although admitting management on beh of himself and Ram Kishore Acharjee, *i.* on behalf of the holders of ten annas), or

examining the plaintiffs who said they had appointed him to be their manager, and had dealt with him as their manager, a variety of witnesses were called to speak to their knowledge of Kallonas's position, and of the fact that the plaintiffs wrote letters appointing him manager. The plaintiffs and Kallonas being the really important witnesses in the case are not examined at all, while all sorts of witnesses of a more or less unsatisfactory character (by which we do not mean to say that they are necessarily false or bad witnesses, but that, from the positions which they avowedly occupied, their evidence is open to comment and doubt) are called to establish matters which a few questions intelligently put to the principals ought speedily to have placed beyond all doubt. In saying this, we are influenced in some degree by what the parties themselves admit in this suit, and what they seem to have admitted in previous proceedings before other Courts.

The case has been so tried that it is impossible to feel any certainty as to how the facts really stand. And the uncertainty is all the greater, because it is tolerably apparent that the Subordinate Judge ought not to have tried the case at all.

The issues to be tried were fixed on the 31st of March 1874. On the 7th of April, Kallonas filed a petition objecting to some of the issues, and asking that they might be amended, and that other issues might be fixed. The Subordinate Judge (Mr. Hutchinson) endorsed on the back of this petition that it might be found necessary to do so during the examination of witnesses, but took no further action on it.

On the 13th of April, Kallonas presented a petition to the District Judge, praying that the suit might be transferred (under section 6 of Act VIII. of 1859) from the Court of the Subordinate Judge to any other Court. The grounds were two—*first*, that Mr. Hutchinson had, in conversation, made such remarks as to facts in issue in the suit that the defendant could not hope for a fair trial; and, *second*, that some of the furniture claimed by plaintiffs was in the house occupied by Mr. Hutchinson, who knew by whom that furniture was taken away, and was himself an important witness in the cause. Objection was also taken in this petition to the Subordinate Judge's not having amended the issues framed by him.

The Judge refused to transfer the case. Before doing so, he referred the petition to the Subordinate Judge to know whether he objected to the transfer proposed. On the same day (April 13th, 1874) Mr. Hutchinson wrote: "My testimony could not benefit "anybody personally. I do not know who "owned the moveables. After Mr. Shortt's "death, people removed the tables, chairs, "&c., but, as it did not concern me, I took "no note of what was removed and by whom "removed. I cannot say anything from "personal knowledge that could benefit any-"body."

After such a memorandum, it is a little surprising to find that, in giving judgment on the 16th July 1874, Mr. Hutchinson says: "At that time I resided with Mr. "Shortt, and continued to occupy the house "after the death of Mr. Shortt. I am "personally aware of the fact that, a few "mornings after Mr. Shortt's death, Mr. "Kallonas and his friends came and removed "a large number of furniture, and some "days after Mr. Thom's servant removed the "rest, leaving only four chairs, four double-"branch wall-shades, one camp-table, and a "pair of brass spittoons."

It is impossible to say that this, if it was legal evidence of the facts stated, would not be important evidence in the suit. So important was it that the respondent's pleader, Baboo Mohinee Mohun Roy, being asked to show us the evidence he relied on as to the furniture, replied that, if the statements made by Mr. Hutchinson in his judgment were not accepted as evidence, the plaintiffs had not sufficiently proved that part of their case, they having relied on Mr. Hutchinson's knowledge of the circumstances.

There is no doubt that, if Mr. Hutchinson knew anything of this furniture, he should have been examined as a witness. As he was not so examined, his statements as to facts within his knowledge cannot be used as evidence in the cause.

It is matter of regret that the case was not transferred; and considering his position, Mr. Hutchinson ought to have supported the application to transfer it to another Court. We say this with the less hesitation, because the whole tone of the judgment shows that the Subordinate Judge really did entertain a certain amount of personal feeling as to the matters at issue, quite enough to make it undesirable that the suit should be tried by him.

As to the question whether Kallonas really was the plaintiffs' manager during the four months subsequent to the purchase, and is liable to account as such, it is very difficult to decide it satisfactorily without hearing

what Kallonas and the plaintiffs have to say on the subject. We therefore remand the case for trial by the District Judge. He will, if possible, examine the plaintiffs who are now carrying on the suit and Kallonas; and he will take any other evidence which may be offered. Having weighed this new evidence along with that already recorded, he will decide whether or not the defendant, Kallonas, was the plaintiffs' manager for the first four months (or any other period) after the 29th Assin 1279, and whether, and to what extent, he is liable to account as such manager. The Court will consider whether there was any express appointment to manage or how otherwise. There is no meaning in the issue raised by the Subordinate Judge as to Kallonas being the "reputed" manager. If he, in fact, managed for the plaintiffs in respect of their shares as well as in respect of the ten annas held by Ram Kishore Acharjee and himself, he is now liable to account, whether he was or was not expressly appointed manager. It matters little how he was appointed, or whether he was formally appointed at all, if he really was the manager on behalf of these plaintiffs, and accepted or took on himself that position.

In saying that the Judge will consider the evidence already recorded as well as any new evidence that may be laid before him, we ought to remind the Judge that the evidence of witnesses as to the contents of letters which are said to have been written and delivered to Kallonas is absolutely worthless, unless they have been admitted by him as evidence, or unless it is proved that the letters did in fact reach him, and that he (or whoever else now is responsible for their present custody) has received notice to produce them, and has failed to do so. Kallonas and the plaintiffs ought to be examined very closely as to such of the letters and documents as are disputed.

In the record of the evidence of Dhununjoy Dey (witness No. 11 for the plaintiffs) we find a remark by the Subordinate Judge that Kallonas has "ere this said in his deposition that the appointment-letter was written." We know of no deposition in which Kallonas admitted this; nor do we understand (nor can any of the pleaders before us explain) to what deposition the Subordinate Judge here alludes. The District Judge, in disposing of the issue now sent to him for trial, will exercise his own discretion on all points, and must not allow himself to be influenced by any observations made by Mr. Hutchinson, whether in his judgme[illegible] otherwise.

As regards the furniture and other pe[illegible]al property, except the boat, no ca[illegible] made out. But as the boat admittedly c[illegible] to Kallonas's hands, the Judge must de[illegible] whether he is liable in damages to any ([illegible] what) extent on that account.

Since this appeal was filed; one of [illegible] plaintiffs, the respondent, Deno Chuc[illegible]butty, has entered into a compromise [illegible] Kallonas, and the appeal has been withd[illegible] as regards him. The orders we now [illegible] therefore, relate only to the plaintiffs, Gu[illegible] Gobind and Joy Gobind and Huri Kisho[illegible]

We are pressed to dismiss the suit outri[illegible] on the ground that the plaintiffs ha[illegible] separate interests ought not to have joi[illegible] as plaintiffs. This objection was taken [illegible] the lower Court, both in the written st[illegible]ment and at the hearing, and it is impos[illegible] to say that the suit is rightly framed. Ne[illegible]theless, we are not disposed to dismiss it [illegible] this ground alone. The purchasers are [illegible] joint possession of the estates; and the f[illegible] that the plaintiffs sued together did [illegible] defendant Kallonas no substantial injusti[illegible] and to dismiss the suit now would be [illegible] throw away all the money which has be[illegible] expended on it, and to leave the plaint[illegible] with a claim which the Law of Limitat[illegible] would probably prevent them from enforci[illegible]

The Subordinate Judge, though not maki[illegible] any decree against the defendants other th[illegible] Kallonas, ordered that their costs should [illegible] paid by Kallonas as "the plaintiffs ju[illegible] made them his co-defendants on precautio[illegible] We scarcely understand what is meant [illegible] making a person a defendant "on precautio[illegible] But it is clear that, if the plaintiffs were [illegible] titled to no relief as against the "defe[illegible]ants on precaution," the costs of th[illegible] defendants should have been borne by [illegible] plaintiffs, if their costs were to be borne [illegible] any one save themselves. There is no co[illegible]ceivable reason why Kallonas should ha[illegible] been ordered to pay them.

The decree of the lower Court is set asid[illegible] The suit is dismissed altogether as to th[illegible] defendants other than Kallonas. As regar[illegible] the plaintiffs other than Deno Nath, it [illegible] dismissed as to the claim in respect of th[illegible] period prior to the 29th Assin 1279, an[illegible] also as to the furniture and damages save a[illegible] far as the boat is concerned; and those plaint[illegible]iffs must pay three-fourths of Kallonas' [illegible] costs proportioned to the value of so much of [illegible] the suit against him as is now dismissed.

The costs of the remand will abide the [illegible]

result of the remand. If the Judge finds that Kallonas is liable to account as manager, he will make such order as is proper as regards zemindaree papers, &c.

The 21st January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Enhancement of Rent—Admission of Predecessor in Title—Decree not conclusive as to fact of Possession.

Case No. 2031 of 1874.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 27th May 1874, reversing a decision of the Extra Assistant Commissioner of Maunbhoom, dated the 18th December 1873.

Bepin Beharee Sircar (Defendant), *Appellant,*

versus

Rajah Nilmonee Singh Deo (Plaintiff), *Respondent.*

Baboos Umbika Churn Bose and *Jogesh Chunder Dey* for Appellant.

Baboos Kalee Mohun Doss and *Bhowanee Churn Dutt* for Respondent.

In a suit for enhancement of rent, in which one of defendant's predecessors in title had acknowledged the justice of the claims instituted by plaintiff, but in which suspicion was thrown over the said admission by plaintiff's own agent's confession that defendant had held the tenure in suit continuously for more than 20 years at the same rent, and the Court of first instance believed that the former admission was collusive, HELD by the High Court that a decree against two persons was not conclusive as to the actual possession by both of any property in suit; and that, though, where the fact of possession at variable rent was incidentally found in a separate suit, the finding was deserving of consideration as evidence, yet the question of the actual possession of the person whose admission was to bind the defendant ought to be decided on its own merits.

Mitter, J.—THIS was a suit for the recovery of rent at an enhanced rate. The lower Courts have not yet decided it finally. But upon one of the points raised in the case, which is the principal question as understood by all parties, the Courts below have come to a final conclusion. This question was whether the tenure of the defendant was liable to enhancement or not. On this question the evidence that has been adduced by the parties consists of oral evidence of witnesses examined by the defendant, and the deposition on oath of the agent of the plaintiff himself, who happens to state facts upon this point favourable to the defendant. On the other hand, the plaintiff has examined witnesses and has produced also a decision between himself and the predecessors in title of the defendant, in which a decree for proprietary possession of the tenure in question was passed in favour of the plaintiff. He has also produced a copy of the written statement of one Modhoo Soodun, who was one of the defendants in that case.

The Court of first instance, principally relying upon the admission of the plaintiff's agent that this tenure was held for more than 20 years at one uniform rent, decided this question in favour of the defendant.

With reference to the copy of the written statement of Modhoo Soodun, that Court was of opinion that, as Modhoo Soodun was not in possession of the property at the time when that written statement was filed, the admission contained in it was made collusively, and, under section 18 of the Evidence Act, was not binding upon the present defendant, because, at the time when this admission was made, Modhoo Soodun had no interest in the property.

On appeal this finding of the first Court has been set aside by the Judicial Commissioner.

With reference to the admission of the plaintiff's agent, the Judicial Commissioner was of opinion that there was clear discrepancy between the Bengali deposition of this agent as recorded by the mohurrir and the English note taken by the Judge. The Judicial Commissioner was of opinion that the Bengali deposition was preferable to the English note, and, according to the former, the admission of the agent did not amount to much.

Then, with reference to the written statement of Modhoo Soodun, the Judicial Commissioner also held a different opinion from that expressed by the first Court, and then upon the whole evidence he came to the conclusion that the defendant's tenure was held at a variable rent, and, therefore, he decided that it was liable to enhancement, and, for the purpose of determining the question of rate, he remanded the case to the first Court.

It appears to us that the judgment of the Lower Appellate Court is not correct. The agent of the plaintiff happens to have been examined on the 15th February 1873 under the following circumstances. It appears that this

suit had been originally dismissed by the Court of first instance upon the ground that no person well acquainted with the facts of the case had appeared on behalf of the plaintiff to depose to them. On appeal that order of dismissal was reversed, and the case was remanded to the first Court for the purpose of giving to the plaintiff an opportunity of producing a person well acquainted with the facts of the case. Upon remand, on the 15th February 1873, this agent, Mritunjoy Mookerjee, was produced, apparently upon his assurance that he would be able to depose to the facts that were material to the case. He also, in his deposition, admits that the statements which he makes are all gathered from the serishta of the zemindaree. We find that, in his deposition of the 15th February 1873, he distinctly states that the tenure has been held at an uniform rent for the last 20 or 22 years. And we also find that there is no variance between the Bengali deposition recorded on that date of this witness and the English note taken by the officer before whom he was examined. Therefore the Judicial Commissioner is not right in saying that there was a discrepancy between the English note and the recorded deposition in Bengali. This error of the Judicial Commissioner seems to have arisen from the fact that the said Mritunjoy Mookerjee seems to have been examined also before the case was remanded on the 17th September 1872, and in that deposition, no doubt, he said that he was not quite sure whether the tenure had been held at an uniform rent for 20 years. All that he said was that it might be that the tenure had been so held for 20 years. But, as I have already shown above that Mritunjoy was examined as the agent of the plaintiff subsequently on the 15th February 1873, and in that examination he distinctly admitted that the plaintiff's tenure had been held for more than 20 years at a uniform rent, and that there is no discrepancy between the Bengali deposition of that date and the English note taken by the Assistant Commissioner before whom he was examined.

Further, also, it appears to me that the reason given by the Judicial Commissioner in coming to the conclusion that the admission contained in the written statement of Mritunjoy must now be held to be binding upon the defendant is erroneous in law. He says: "It is clear that, under section 18 "of the Evidence Act, had the present suit "been against Modhoo Soodun, he would "have been barred by that admission. It "follows therefore that, under the same se "the defendant, having acquired his "from Modhoo Soodun and Digambur "ly, is bound by the admission of "former."

It appears to me that he has here ass the fact that the present defendant derive his title from Modhoo Soodun Digambur jointly. It is true that the d was passed against Modhoo Soodun Digambur jointly, and in execution of decree that the rights and interests of Modhoo Soodun and Digambur in this perty were sold and purchased by the pr cessor of the defendant. But it does follow that it is not open to the defenda say now that of these two persons Mo Soodun had no interest in the property, that the whole of the property belonge the other defendant alone. That is prec what was said by the defendant in the Court, and that is precisely what was fo upon the evidence in the case by that C in favour of the defendant. It is there necessary for the Judicial Commissione decide this question, namely, whether property really belonged to Modhoo Sood and Digambur jointly or to Digam alone.

Then the Judicial Commissioner fur goes on to say: "The argument of "lower Court that Modhoo Soodun had "interest in the subject-matter of the "when he made the admission is untena "as the decree was given against him "Digambur jointly. Modhoo was ma "responsible for mesne-profits from 1264 "1267 B., and the rights of Modhoo joi "with those of Digambur were subsequen "sold by auction." Because a decree passed against both Digambur and Mod Soodun, it does not appear to me that follows that, as a matter of course, Mod Soodun must be held to have some inter in the property. As I have alre observed, it is quite open to the defendant show that of these two persons, whose rig and interests were sold and purchased b his predecessor, one had only real interest the property and the other had non Therefore I think that the reasons given the Lower Appellate Court in overruling th opinion of the first Court are not correc and the errors are such that we can interfe in special appeal.

It remains only to notice an objectio which was taken by the learned pleader for the respondent, namely, that it is not necessary, notwithstanding these errors, t

and this case to the Lower Appellate rt, because the question at issue, namely, ther the tenure was held at a variable or not, had been determined in a previous suit between the parties.

On referring to that judgment, it seems the learned pleader's contention is, to a tain extent, right, and that an issue upon t question was raised in a former suit, and issue was also decided in favour of the intiff. But I do not think that that decision is conclusive upon the question. The e arose incidentally in that suit which s one for possession, and, therefore, determination of that issue. in that suit would ly be evidence in this case whatever may its worth; and the Lower Appellate Court uld be justified in taking into consideration that evidence in coming to a conclusion ether this tenure is liable to enhancement not. With these remarks we remand the se to the Lower Appellate Court for re-trial. sts will abide the result.

Glover, J.—I concur.

The 25th January 1876.

Present:

he Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

ossession under a Decree—Ejectment—Opposite Party—Parties not before Court—Remedies.

Case No. 2881 of 1874.

pecial Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 21st August 1874, reversing a decision of the Moonsiff of Raojan, dated the 17th March 1874.

Mahomed Wali (Plaintiff), *Appellant,*

versus

Noor Buksh (Defendant), *Respondent.*

Baboo Aukhil Chunder Sen for Appellant.

Baboo Bama Churn Banerjee for Respondent.

If substantial, and not merely formal, possession is obtained under a decree, and the decree-holder is subsequently ejected, he has a fresh cause of action, and may sue to recover possession. But, if he is not allowed to get possession at all under his decree, his remedy is by proceedings taken against the opposing party in execution of his decree.

Such suit as above described should be dismissed, so far as plaintiff fails to prove his title to relief against the defendants before the Court, leaving the plaintiff to seek his remedy (if any) against any one not before the Court by a separate suit.

Macpherson, J.—It appears to us that this appeal ought to be dismissed. The suit was originally a suit against Yusoof Ali and Alimuddeen. The plaintiff's case was that he, on the 26th of June 1871, got a decree for possession of certain land including that which is the subject of this suit, and that possession was given him according to the decree by the Court Ameen on the 25th September 1871, but that the defendants, Yusoof and Alimuddeen, dispossessed him. And he sought to recover possession and mesne-profits from them.

The Moonsiff, when the case was first before him, found that a portion of the land was in the possession of the present respondent, Noor Buksh, who was not then a party to the suit, although he was one of the defendants in the original suit in which the plaintiff got a decree for possession. Therefore the Moonsiff rightly considered that, so far as concerned the property in the possession, not of the defendants sued, but of Noor Buksh who was not sued, the plaintiff's suit must fail. Accordingly he dismissed the suit as to that portion of the land. The Lower Appellate Court, however, unfortunately remanded the case for re-trial as to this part of the plaintiff's claim, directing Noor Buksh to be made a party to the suit.

This was wholly wrong. The proper way to deal with the case was to do that which the Moonsiff had done, namely, to dismiss the suit, so far as the plaintiff had failed to prove himself entitled to relief as against the defendants before the Court, leaving the plaintiff to seek his remedy (if any) against Noor Buksh or any other person not then before the Court, by bringing a suit for that purpose if so advised. But, as a matter of fact, the case was remanded for re-trial as against Noor Buksh.

The Moonsiff, having added Noor Buksh as a defendant, tried the case as against him, and gave a decree in favour of the plaintiff. The

District Judge, before whom the second appeal came (Noor Buksh alone being appellant), held that no case was proved against Noor Buksh, and reversed the decision of the Moonsiff.

We think that the District Judge is right, as he finds that it is not proved when or in what manner Noor Buksh dispossessed the plaintiff or withheld possession from him. We agree in thinking that the plaintiff was bound to prove distinctly that he had got possession from the Court Ameen, and that, having got possession from the Court Ameen, he was subsequently turned out of possession by Noor Buksh. The plaintiff's case was put before the Court in a most feeble and indecisive manner. At one time the case was that he actually got possession under the first decree from the Court Ameen, at another time the case was that Noor Buksh would not allow him to take possession. If the plaintiff ever actually got possession under the decree of the 26th June 1871 (by which is meant real substantial possession, and not merely a formal sticking of a bamboo into the ground, or the like), and if Noor Buksh subsequently ejected him, the plaintiff would no doubt have a fresh cause of action, and might sue to recover possession. But, if Noor Buksh never allowed the plaintiff to get possession at all under his decree of the 26th June 1871, then the plaintiff's remedy was by proceedings taken against Noor Buksh in execution of the original decree, and not by bringing a fresh suit. A decree for possession now passed would leave the plaintiff (so far as Noor Buksh is concerned) exactly where he was when he got his decree in 1871, if his present case is that Noor Buksh has throughout prevented his getting possession under that decree.

We agree with the Judge that the decree of the first Court against Noor Buksh was bad, it not being shown that the plaintiff ever got really into possession under the first decree, or that, if he ever actually was in possession, he was subsequently dispossessed by Noor Buksh. This suit cannot, possibly, proceed as against Noor Buksh, unless these facts are proved, and proved, not by vague assertions and suggestions, but by accurate and distinct evidence showing precisely what occurred, and when it occurred.

This appeal is dismissed with costs.

The 25th January 1876.

Present:

The Hon'ble A. G. Macpherson and G. Morris, *Judges.*

Possessory Suit—Disclaimer.

Case No. 44 of 1875.

Special Appeal from a decision passed by the Third Subordinate Judge of Tipperah, dated the 15th September 1874, affirming a decision of the Moonsiff of Nasirnuggur, dated the 8th December 1873.

Radha Kishen Chowdhry (Plaintiff), *Appellant,*

versus

Komul Shaw and others (Defendants), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Bharut Chunder Dutt for Respondents.

If one of the defendants in a suit for possession in a written statement disclaiming all interest in property in suit, and a decree is made by reason on the faith of such disclaimer, the decree is against him, and he is absolutely concluded by long as fraud is not proved.

Macpherson, J.—The plaintiffs contend that the respondent Nitye, who intervened in this suit (not having originally been made a defendant) has no right to interfere and is not entitled to oppose their obtaining khas possession as prayed.

The plaintiffs further allege that the matter is concluded by what occurred in a previous suit, in which a decree was made on the 8th November 1861. It is said that that suit establishes finally as against Nitye the plaintiff's right to this land.

The case cannot now be properly tried without the Court having before it the plaint in the former suit, and the written statement which was put in by Nitye, and the judgment and decree. At present we know nothing about that former suit except the written statement of Nitye and the decree. In his written statement, Nitye disclaimed all interest in the subject of the suit; and the decree was drawn up against only the defendants other than Nitye, and gave Nitye his costs from the plaintiff.

It may be that the decree was so drawn up, because Nitye, by his written statement, declared that he had no interest in the matter in suit, and had no objection to the decree being in favour of the plaintiff. But this is a matter to be determined on evidence. It is impossible to form any opinion on that point without knowing precisely what occurred; and, in order to ascertain this, Nitye probably ought to be examined as a witness.

The Subordinate Judge says it seems doubtful whether Nitye knew what he was about when putting in that written statement in the former suit. We are at a loss to understand why the Subordinate Judge says this, seeing that Nitye never came before the Court to say so for himself. Clearly, so long as no fraud is proved to have been practised against him, Nitye is bound by the former decree if it was made by reason and on the faith of his disclaiming all interests in the property then in suit. If Nitye disclaimed all interest in the property, and by so disclaiming induced the plaintiff to take the decree in the form in which it was drawn up and to pay him his costs, the decree is valid against Nitye, and he is absolutely concluded by it. We do not mean to say that a different interpretation may not be put upon what occurred in that suit if facts are proved which warrant a different interpretation. But the fact that Nitye now claims four annas of the land can be no evidence whatever that he did not know what he was about when putting in his written statement in the former suit.

If the former plaint and judgment and decree be put in evidence, and if Nitye be examined as a witness, the Court will be able to find, as a matter of fact, whether the subject of the present suit was included in the former suit, and whether the former decree is binding on Nitye. If these issues are decided in favour of the plaintiffs, they are entitled to a decree. If they are decided against the plaintiffs, then the Lower Appellate Court must determine how far one co-sharer can sue to eject under such cir umstances as those in which the plaintiff : placed.

: determination of that and all other qu tions must be reserved until it is decided wl her Nitye did really, in the former suit, di aim all interest in the subject of the pl ent suit, and allow a decree to go against hi in favour of the plaintiffs which is bi ng as against him.

judgment of the Lower Appellate Court is set aside, and the case will go back to the Subordinate Judge who will re-try it himself, and will take such further evidence as he may consider necessary. The plaint and judgment and decree in the former suit must be put in, and Nitye must be examined very closely as to his written statement and all other matters connected with the former suit and his alleged disclaimer.

Costs will follow the result.

The 2nd February 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Re-survey of Estates — Accretion — Claim — Facts to be found in Ameen's Report.

Case No. 1786 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 30th June 1874, reversing a decision of the First Subordinate Judge of that District, dated the 6th June 1873.

Mussamut Mowla Koomaree (Defendant), *Appellant,*

versus

Mutty Singh and others (Plaintiffs), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboos Rajendro Nath Bose and *Chunder Madhub Ghose* for Respondents.

In a suit which plaintiff claimed some land as an accretion to his estate, but in which defendant claimed the said land as forming part of his estate according to the survey of 1846, and an Ameen reported that, though an erroneous survey in 1865 included the said land in plaintiff's estate, yet, in the earlier survey, it had been thaked as defendant's, who indeed had obtained a decree for it against the Government, HELD that, before plaintiff could be entitled to a decree for the land in suit, he must establish facts which, according to the law of accretion, would be sufficient, not only to extinguish defendant's title, but also to create a right in plaintiff's favour; the mere circumstance of the survey of 1865 including the said land in plaintiff's estate not being sufficient proof of the facts to be found.

Mitter, J.—PLAINTIFF is the proprietor of Mouzah Sehawa, and the defendant that of the northern half of Mouzah Katawah, the 16 annas of which having been divided by partition into two equal halves. Contiguous to these two mouzahs is Mouzah Bhowanundpore, a Government khas property. All

these mouzahs were originally surveyed in the year 1846; subsequent to which there having been various changes in their dimensions by the action of the Ganges, they were surveyed again in the year 1865. The defendant, questioning the correctness of the survey-maps prepared in the year 1865, brought a suit in the year 1868 against the Government and their ijaradars, who were in possession of Mouzah Bhowanundpore, for possession of a plot of land within defined boundaries as appertaining to his Mouzah Katawah according to the survey-map of 1846. This suit was decreed in favour of the defendant, who having been put in possession of it by the execution Court, the plaintiff instituted this suit under section 230 of Act VIII. of 1859, on the allegation that the defendant attempted to take possession of a plot of land appertaining to the Mouzah Sodhia in execution of the decree.

The defendant alleged that the land claimed in this suit is a part of the land decreed in his favour, and really appertains to Mouzah Katawah, and not to Sodhia.

An Ameen was deputed to hold a local investigation, and the result of his inquiry was to establish that there was a discrepancy between the thak and survey maps of 1865 as to the boundary of the plaintiff's Mouzah Sodhia. The Ameen also found that the whole of the disputed land fell within the defendant's mouzah according to the survey-map of 1846 and the decree obtained by him against Government. But, according to the thak-map of 1865, 130 beeghas 3 cottahs 8 chittacks, and the survey-map of that year, 89 beeghas 19 cottahs 8 chittacks out of the land in suit, fell within the plaintiff's mouzah. No exception has been taken to the Ameen's report, which has been accepted as correct by the Courts below. The Lower Appellate Court, for reasons given in its judgment, has given to the plaintiff a modified decree for 130 beeghas 3 cottahs 3 chittacks according to the survey-map of 1865.

The defendant has preferred this special appeal, and the main ground urged against the decision of the Lower Appellate Court is, that a decree has been given in favour of the plaintiff without establishment of his title. Because, taking all the findings of fact come to by the Lower Appellate Court as correct, they do not establish any right in favour of the plaintiff to the land decreed in his favour.

I am of opinion that this contention is well founded. The only ground upon which the Lower Appellate Court has awarded a decree in favour of the plaintiff for a p of the disputed land is that, according to survey-map of 1865, he is entitled to Now it has been found by the Ameen according to the survey-map of 1846, portion of the disputed land would fall wi the plaintiff's Mouzah Sodhia, but the wh of it would appertain to the defenda Mouzah Katawah. Therefore it is clear the survey-map of 1865 comprises m land than what was within the original surv map of 1846, and the land decreed in plai iff's favour was not within the survey-m of 1846 of Mouzah Sodhia, but includ within that mouzah according to the bounda of the survey-map of 1865. It was, therefor some land which has been alleged to have bee gained to the plaintiff's mouzah after 184 and detached from the defendant's Mouza Katawah. The plaintiff also has described as the *burroree* (accretion) land of Mouza Sodhia, and he has also acquiesced in Govern ment making a settlement of it with hi as towfeer land, *i. e.*, land in excess of th original mouzah, which has been permanent settled. It is further evident from th Ameen's report accepted by the Cou below that the land decreed to the plaint originally belonged to the defendant's mouzah and for which the latter has obtained decree against the Government. The plai iff claimed it as accretion to his mouzah and he is not entitled to a decree for unless he proves facts, which, according to the law of accretion, would be sufficient, not only to extinguish the defendant's title to it, but would create a right in plaintiff's favour. The mere fact that it was included in the survey-map of Sodhia of 1865 does not establish these facts. The defendant questioned the accuracy of the survey-operation of 1865, and succeeded by a suit in getting them corrected, and obtaining a decree for the land in suit according to the survey-map of 1846. He is, therefore, entitled to remain in possession of it until the plaintiff can establish a superior title. The plaintiff has not adduced any evidence which would be sufficient in law to establish that superior title according to the law of accretion of chur lands. But he has adduced evidence of prior possession, and if the fact of prior possession be found in his favour, he would be entitled to a decree unless the defendant would establish a title not barred by limitation. This would be the correct principle of decision in this case, because the plaintiff, who was no party to the suit brought by the defendant against Government, should not

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deprived of the right (which a party in possession always has) of setting up the law of limitation for the protection of his possession title. The Lower Appellate Court has come to any finding upon this question. The finding upon which the Lower Appellate Court has awarded a decree is, as have shewn above, not sufficient in law. I would, therefore, reverse the decree and judgment of the Lower Appellate Court, and remand the appeal for re-trial, and would make the costs abide the result.

Glover, J.—I concur in the order of remand.

The 15th February 1876.

Present :

The Hon'ble G. G. Morris, *Judge.*

Appellate Court—Remands.

Case No. 258 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of Tipperah, dated the 2nd December 1874, reversing a decision of the Moonsiff of Moornuggur, dated the 31st December 1873.

Bhoy Churn Deo and others (Defendants), *Appellants,*

versus

Ram Doollub Deo (Plaintiff), *Respondent.*

Baboo Nullit Chunder Sen for Appellants.

Baboo Aukhil Chunder Sen for Respondent.

Where the first Court had decided a suit on the first and second issues, but expressed no opinion on the third, which had reference to the rights of the parties, it was HELD that the Lower Appellate Court had no power to remand the case for trial, but should have decided it on the evidence in the record.

In this case the parties went to trial on three issues as framed by the first Court. In support of these issues both parties adduced evidence.

The first Court decided the case on the first and second issues, but expressed no opinion on the third issue, which had reference to the rights of the parties.

The Subordinate Judge, on appeal, overruled the decision of the first Court on the question of limitation, and remanded the case for a determination of the question of right and possession combinedly.

It is urged here in special appeal that the Subordinate Judge had no power to remand the case for trial, but should have decided it himself on the evidence which is on the record.

It is clear that this objection must prevail, and that the Subordinate Judge has acted contrary to the provisions of section 352 of the Procedure Code. His order of remand is, therefore, set aside, and the case must go back to him in order that he may decide it himself on the evidence upon the record.

It may be noticed that an objection is taken that, in his judgment, the Subordinate Judge has treated the year 1270 (which is the year in which a certain ijara pottah was given) as being of the Bengali era, whereas in point of fact it is of the Tipperah era. He must see whether this is so or not.

Costs will abide the result.

The 16th February 1876.

Present :

The Hon'ble G. G. Morris, *Judge.*

Lapse of Title—Wrongful Possession.

Case No. 330 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 30th November 1874, reversing a decision of the Moonsiff of Sherajgunge, dated the 11th June 1874.

Kristo Gopal Roy and another (two of the (Plaintiffs), *Appellants,*

versus

Roodro Chunder Roy and others (Defendants), *Respondents.*

Baboos Doorga Mohun Doss and *Mohinee Mohun Roy* for Appellants.

Baboo Huree Mohun Chuckerbutty for Respondents.

Where a person's title to land is extinguished by reason of his having been long out of possession, no new right or cause of action can accrue to him by taking wrongful possession.

THERE appears to me to be no sufficient reason for interfering with the judgment of the Lower Appellate Court. That Court has found upon the evidence that the lands in suit have been held by certain ryots under the defendants, respondents, to whom they paid rent for fifteen or sixteen years prior to the 22nd Falgoon 1279. On that date the plaintiff took forcible possession of these lands. A suit under section 15 of Act

XIV. of 1859 was instituted, and the Court held that the plaintiff had wrongfully dispossessed the defendants from the lands on that date. Before the decree under that Act could be brought to execution, the plaintiff instituted this suit to obtain a declaration of his title. It seems to be quite clear that as, prior to the 27th Falgoon 1279, the plaintiff had not been in possession of these lands for a period of fifteen or sixteen years, his title in them was extinguished, and no new right or cause of action can accrue to him by reason of his wrongful possession since that date.

The appeal is dismissed with costs.

The 17th February 1876.

Present:

The Hon'ble G. G. Morris, *Judge.*

Tenant versus Tenant—Ejectment—Notice to Quit.

Case No. 494 of 1875.

Special Appeal from a decision passed by the Officiating Second Subordinate Judge of Tipperah, dated the 21st December 1874, reversing a decision of the Sudder Moonsiff of that District, dated the 6th April 1874.

Chunder Monee Chanda (Plaintiff), *Appellant,*

versus

Brindabun Nath (Defendant), *Respondent.*

Baboos Kally Mohun Doss and *Doorga Mohun Doss* for Appellant.

Baboo Bharut Chunder Dutt for Respondent.

In a suit between two rival tenants having the same landlord, the one striving to obtain, and the other to maintain, possession of a particular parcel of land, where it is found that the defendant is still in occupation and has not been ejected by the zemindar, the mere production of a pottah alleged to have been granted to the plaintiff by the zemindar cannot, of itself, determine the tenancy of the defendant or enable the plaintiff to stand in the shoes of the zemindar and serve the occupant tenant with a notice to quit.

THE plaintiff brought this suit to obtain possession of certain three kanees of land which had been found by a possessory award, dated the 16th September 1873, to be in the possession of the defendant. In proof of his title to this land, the plaintiff set up a pottah of August 1873, alleged to have been granted him by the Rajah zemindar. The defendant opposed the claim of the plaintiff, on the ground that he had a right of occupancy in the land. He also asserted that he could not be ejected without a previous notice on the part of the zemindar. Both the Lower Courts have found that no right of occupancy exists in the defendant. In the matter of the notice the first Court expressed itself as follows: "It has been contended, on the "half of the defendant, that the zemindar "had no power to grant the lease without "having previously served a notice of eject-"ment on the defendant. But this contention does not seem to me valid. This suit "is not a suit for ejectment by the zemin-"dar. It is a suit between ryot and ryot, "each party setting up his right and title, "such, and they must stand or fall according "as they succeed or fail in making out their "ground." The Moonsiff, therefore, gave the plaintiff a decree to recover possession of the land in dispute. The Subordinate Judge, on appeal, differed from the first Court on this point saying: "The defendant's tenancy has "not yet been determined. He is a tenant "the term of whose tenancy is not for any "definite period. Consequently, the understanding is that the said tenancy is determinable at the option of either party, the "landlord or the tenant, by a previous notice. The landlord has not yet notified to "the tenant to quit; and so long as he does "not choose to do so, the defendant has the "right to remain on the soil." He, therefore, refused to give a decree for possession in favour of the plaintiff.

In special appeal it is urged that the defendant's claim to a right of occupancy having failed, a decree ought to have been given in favour of the plaintiff, and a decision in the 14th Weekly Reporter, p. 168, is quoted as an authority in point. But it is quite clear that the defendant not only raised the question of right of occupancy, but asserted the necessity of a notice, and both the lower Courts have dealt with this point. It is next contended that there was no express issue on this point of notice, and that therefore the case should be remanded in order that it may be determined whether the Rajah zemindar was bound to serve a notice on the defendant at all, or whether he did, in fact, serve a notice upon him. Or in lieu of this, the Court is asked to follow the principle laid down in 23 Weekly Reporter, p 440, in the case of Hem Chunder Ghose (Plaintiff) *Appellant vs.* Radha Pershad Paleet (Defendant) *Respondent,* and direct

decree be given in favour of the plaint-
ing a date for giving up possession
shall be fair towards the defendant.
seems to me that the plaintiff is not
position to make a demand of this sort.
is a suit between two rival tenants hav-
e same zemindar for their landlord, the
triving to obtain, and the other to main-
possession of a particular parcel of land.
as been found by the Lower Appellate
t that the defendant is still in occupa-
of this parcel as a tenant of the zemin-
The Rajah zemindar has not chosen to
the defendant from the land, and, there-
the mere production of a pottah alleged
ve been granted by the Rajah to the
iff cannot, of itself, determine the tenan-
f the defendant, nor can it create a right
h, whether it exists in the Rajah or not,
Rajah has not chosen to enforce. The
tiff cannot possibly stand in the shoes
e Rajah zemindar either to demand that
ce to quit be served upon the defendant,
ask that the suit on his part be treated
ch a notice.
nder these circumstances, it appears to
that the judgment of the Lower Appel-
Court is right, and the appeal must be
issed with costs.

The 21st February 1876.

Present:

The Hon'ble G. G. Morris, *Judge.*

Fraud—Onus Probandi.

Case No. 899 of 1875.

cial Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 19th February 1875, reversing decision of the Moonsiff of Panchookhoria, dated the 13th May 1874.

beerrooddeen and others (Defendants), *Appellants,*

versus

Jogul Shaha and others (Plaintiffs), *Respondents.*

Moonshee Serajul Islam for Appellants.

Baboo Protab Chunder Mojoomdar for Respondents.

In a suit to set aside a pottah on the ground of fraud, onus of proving fraud rests with him who alleges it, until he discharges this obligation and discloses a *primâ facie* case of fraud on the part of the defendants, there is no need for the Court to proceed further.

THIS suit has been wrongly dealt with by the Lower Appellate Court. It was a suit brought by a recent purchaser of a share in a talook to set aside a mirassi pottah of anterior date, purporting to have been granted by the former sharers in the talook to the defendants.

The Lower Appellate Court gave a decree in favour of the plaintiff.

The objection in special appeal is that this decree has been given entirely on a consideration of the evidence brought forward by the defendants, and not on any consideration of evidence adduced by the plaintiff to prove his allegation that the pottah was set up by the defendants in collusion with the other shareholders of the talook in fraud of his rights.

It is also objected that, by not looking first at the evidence adduced by the plaintiff, the Lower Appellate Court has misapprehended the force of the evidence produced on the part of the defendant. As an illustration of this, the following passage in the judgment of the Subordinate Judge is referred to: "The plaintiffs say that, after their purchase "in 1274 and 1276, the defendant Ashruf "Mollah, in collusion with their vendors, has "got the pottahs with prior dates. Conse-"quently the depositions of Pannaoollah and "Kashee Nath, two of the vendors, brought "in by the defendant, cannot be safely relied "upon, if there is no other evidence to show "that the pottahs were *bonâ fide* granted in "1271. The only other evidence is the "deposition of Baddarooddeen, but he point-"ed out another paper as pottah, and when "that real pottah was put in his hands, or "shown to him, he said that he did not sub-"scribe to it as witness."

It is pointed out here that disbelief in the evidence of the two vendors is not a necessary consequence of the allegation of the plaintiff that "the defendant Ashruf Mollah, "in collusion with their vendors, has got the "pottahs with prior dates." Nor, again, in the passage where the Lower Appellate Court, after expressing doubts regarding the dakhillas put in by the defendants, says: "There "is no tittle of proof to show that the defen-"dant was in possession from 1271 as per "mirassi pottah," is it warranted in drawing the conclusion "that the pottah has been "granted after 1276 with a prior date."

These objections seem to me to have much force. The plaintiff came into Court, alleging that a certain pottah, granted by the former

sharers in the talook, is a false and fraudulent document. It is for him to give evidence in support of this allegation. The onus of proving the fraud rests on him, and until he discharges this obligation and discloses a *primâ facie* case of fraud on the part of the defendants, there is no need for the Court to proceed further.

In the case referred to in the 22nd Weekly Reporter, p. 124 (Rajnarain *vs.* Rowshun Mull), it is clearly laid down that, where a party puts forward a charge of collusion with a view to defraud, he must give distinct and direct evidence of such collusion and fraud. Here, so far as appears from the judgment of the Lower Appellate Court, there is nothing to show that the plaintiff has made out any case of fraud on the part of the defendants and the grantors of the pottah. The case must, therefore, go back to the Lower Appellate Court for re-trial. The Subordinate Judge must see whether there is such evidence on the part of the plaintiff as supports the allegation of fraud. If there is no such evidence, the plaintiff is not entitled to a decree.

Costs will abide the event.

The 21st February 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

A Statement in Mutation Proceeding is Evidence —Fact found not to be overlooked without re-trial of Issue—"Document" under Evidence Act.

Case No. 402 of 1875.

Special Appeal from a decision passed by the First Subordinate Judge of Bhaugulpore, dated the 3rd December 1874, reversing a decision of the Sudder Moonsiff of that District, dated the 25th June 1874.

Budree Lall (Plaintiff), *Appellant,*

versus

Bhoosee Khan (one of the Defendants), *Respondent.*

Baboos Taruck Nath Dutt and *Judoo Nath Sahoy* for Appellant.

Moonshee Mahomed Yusuf for Respondent.

In a suit for recovery of lands claimed partly in virtue of rights obtained under a kobala and partly in virtue of rights purchased at a sale in execution of decree in which the Lower Appellate Court refused to recognize a statement made before a Collector in a mutation proceeding as a "document" under the Evidence Act and overlooked a finding in the Court of first instance in favour of the plaintiff,—HELD by the High Court that a statement made before a Collector in a mutation proceeding is a document entitled to be received as evidence under s. 90 of the Evidence Act; and that a finding in favour of a party in the Court of first instance cannot be overlooked on appeal, without directing a re-trial of the issue relating to the point, or affording the party opportunity of strengthening his case.

THIS was a suit to recover possession of certain land, part as having been sold direct to the plaintiff by kobala, and part as the interest of sundry judgment-debtors, whose rights had been sold in execution of a decree and purchased by the plaintiff. The question to be decided, and for which there has already been a remand to the Court of first instance, are whether the property (8 annas 10½ gundas) claimed belonged to plaintiff's vendor, Musst. Nageena, and whether she had the property to sell, and also whether the judgment-debtors whose rights plaintiff purchased had any share in the estate, and if so, what share.

The estate belonged originally to Bullee Khan, and the defendant is a member of the family, one of his grandsons. The plaintiff alleges that Musst. Najoo, wife of Kh[illegible] one of the sons of Bullee Khan, and Musst. Hafeeun, his daughter, sold to Musst. Nageena, the wife of Bahadoor Khan, second son of Bullee Khan, 8 annas 10½ gundas share of the property, and that Musst. Nageena sold, in turn, to him (plaintiff).

He also alleges that 3 annas ¾ pies share belonged to Musst. Bhandee, wife of Bahadoor, and Mahboob and Mungul his sons, and that their interests were purchased by him in execution of decree.

The Subordinate Judge fixed the following two issues:—

(1) Whether the persons through whom plaintiff claimed had any right to the property? and

(2) If they had, were their titles legally conveyed to the plaintiff?

The Subordinate Judge held that the plaintiff had been unable to prove the title of the persons through whom he claimed, that the genealogical tree had not been proved; and that the judgment-debtors were not shown to be Bullee Khan's heirs. With regard to the purchase from Najoo and Hafeeun, the Subordinate Judge held that there was no proof that their rights, if they had any, were conveyed to the plaintiff by Musst. Nageena.

With regard to the rights of the judgment-

debtors, the Subordinate Judge is not correct in stating that the defendant denies *in toto* those rights. The written statement denies Najoo and Hafeeun's right to reversion, no doubt, and also that of others through whom the defendant claims; but it admits that Mahboob and Mungul, two of the judgment-debtors, were sons of Bahadoor, and, therefore, entitled, if they were alive when their father died, to some share of the family-property. There is a somewhat dubiously-worded statement with regard to Mahboob. It is said that he died without issue, but the date is not given; whilst, as for Mungul, it is distinctly asserted by the defendant, and the statement is not denied, that Mungul is alive to the present time.

Then as to the evidence in support of the genealogical tree, the Subordinate Judge differs from the Moonsiff, and holds the descent not proved for the following reasons:—

The decision of 1858 is not to be found on the record, and, therefore, the Subordinate Judge takes no notice of it;

The statement of Bahadoor is not admissible as evidence; and

Imam Buksh's evidence is not credible.

With regard to Imam Buksh, there is, of course, nothing to be said. This is a special appeal, and the Subordinate Judge's estimate of the credibility of the witness's evidence is no ground of objection in law.

The Subordinate Judge has refused to receive as evidence Bahadoor's statement, on the ground that the mere production of a copy of the statement is not sufficient to prove its correctness, or that it was really made by Bahadoor.

The statement in question was made in 1843 in the course of a mutation-proceeding before the Collector, when Bahadoor was examined for the purpose of ascertaining, who, besides Ranoo, the third son of Bullee Khan, were co-sharers in the estate, and in this statement Hafeeun was declared to be his sister of the full blood. Musst. Najoo is not mentioned.

The Subordinate Judge says that section 90 of the Evidence Act refers to documents and not to statements; but he appears to have overlooked the effect of section 80, which declares that, "when any document is produced before any Court, purporting to be a memorandum of the evidence given by a witness in a judicial proceeding, or before any officer authorized by law to take such evidence, the Court shall presume that the document is genuine, * * * and that such evidence was duly taken."

Under this section, therefore, the Subordinate Judge was bound to take the examination of Bahadoor recorded in the mutation case in November 1843 as genuine, and as having been duly taken. It was legal evidence, *quantum valeat*, in support of the plaintiff's case, and the Subordinate Judge was not justified in ignoring it on the grounds recorded in his decision.

Then, with regard to the witnesses. The finding as to Imam Buksh cannot be interfered with, but I find on the record another witness, Ranoo Singh, who speaks to the fact that Bullee Khan had a daughter named Hafeeun, and that Mahboob and Mungul were sons of Bahadoor. This was evidence, whatever might be its value, in support of the plaintiff's case, and the Subordinate Judge ought to have considered it.

Then as to the proof of the plaintiff's purchase from his vendor, Musst. Nageena. It appears that, on the original trial on the 11th September 1873, an issue was fixed as to the truth of this purchase, and whether possession passed under it. The Moonsiff decided the issue in favour of the plaintiff. On appeal the Subordinate Judge remanded the case on other points, and the Moonsiff on the remand, whilst finding still for the plaintiff, passed no further decision in respect of Nageena's conveyance; but the Subordinate Judge, on the defendant's appeal, has now decided that the purchase from Nageena had not been proved, and that without going any further into the point, or giving the plaintiff an opportunity of strengthening his case. If the Subordinate Judge, on the ground that the whole case was still open, desired to re-consider the question of Nageena's conveyance, a question decided in 1873, and regarding which, so far as I can see, no substantial objection was taken, he ought to have directed the issue to be re-tried by the Moonsiff, and then have disposed of it himself on appeal. I have already stated that, on the remand, the question of Nageena's conveyance does not appear to have been mooted, for the Moonsiff fixed no issue regarding it, and, no doubt, considered the point finally disposed of in favour of the plaintiff.

It seems to me, therefore, that, in the particulars I have noted above, the Subordinate Judge had fallen into errors of law, and that those errors have, undoubtedly, affected the merits. He ought, I think, if he still holds that Nageena's conveyance is dubious, to have an issue on the point fixed and tried. And as regards the shares of the

parties whose rights he says he has purchased, the Subordinate Judge must take into consideration the evidence which he has improperly overlooked.

The case is remanded to him with reference to the above remarks, and costs will follow the result.

The 22nd February 1876.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Proceedings under s. 38, Act VIII. of 1869.

Appeals under section 15 of the Letters Patent from a decision passed by the Hon'ble F. A. Glover, one of the Judges of this Court, dated the 3rd August 1875, in Special Appeals Nos. 1670 and 1671 of 1874.

Shaikh Jamalooddeen Hossein (Plaintiff), *Appellant,*

versus

Ramadheen Misser and another (Defendants), *Respondents.*

Moonshee Serajul Islam for Appellant.

Baboo Taruck Nath Dutt for Respondents.

In a suit in which defendant had admitted his tenancy but had disputed the amount of the rent claimed by plaintiff, and plaintiff had not made a special application to the Collector, under s. 38, Act VIII. of 1869, for the determination and record of tenures, under-tenures, and rates of rent in the land in suit—HELD that, in the absence of any special order of the Collector fixing the rates of rent, there was no legal order which could be considered final.

Kemp, J.—THESE are appeals from the decision of Mr. Justice Glover. The plaintiff is the appellant in both cases. The suit was for rent. The defendant admits the tenancy, but disputes the amount of rent claimed. All three Courts—the Moonsiff, the Subordinate Judge, and the learned Judge in this Court—have dismissed the plaintiff's claim, holding that the proceedings under section 38, Act VIII. of 1869, are not final proceedings, and are not binding upon the defendants.

Two points are taken in appeal before us—*1st*, that the defendant having alleged collusion on the part of the Ameen, the onus of proving that allegation was on the defendant; *and*, that the Civil Court was not competent to re-open the proceeding[illegible] section 38.

We take the last point first. Und[illegible] tion 38 a proprietor may apply for [illegible] surement, or, on special application, [illegible] ask the Collector to ascertain, determin[illegible] record the tenures, under-tenures, an[illegible] of rent payable for such tenures. [illegible] was, in this case, no special application [illegible] under section 38, and, therefore, in [illegible] absence of such special application, no [illegible] fixing the rates of rent payable, co[illegible] passed by the Collector, and, therefore, [illegible] was no legal order on the part of the C[illegible] tor that could be considered as final.

The appeals are dismissed with costs.

The 23rd February 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, [illegible] *Justice*, and the Hon'ble E. G. [illegible] *Judge.*

Act VIII. (B. C.) of 1869—Streets in T[illegible] Buildings—Ejectment—Enhancement of [illegible]

Cases Nos. 2147 to 2149 of 1874.

Special Appeals from a decision pass[illegible] the Judge of Bhaugulpore, dated t[illegible] June 1874, reversing a decision o[illegible] Moonsiff of Monghyr, dated the [illegible] February 1874.

The Collector of Monghyr (Plaintiff), *Appellant,*

versus

Hakim Madar Buksh and others (Defend[illegible] *Respondents.*

The Officiating Advocate-General for A[illegible] lant.

Mr. M. L. Sandel for Respondent[illegible]

Act VIII. (B. C.) of 1869 relates only to agric[illegible] holdings, and its provisions have no application t[illegible] forming part of a street in a town:

The mere fact that a building has been erected [illegible] piece of land with the consent of the proprietor, [illegible] not give the occupant a right to hold the land p[illegible] tually at the same rate; and if the proprietor, w[illegible] ultimate view of raising the rent, brings a suit for e[illegible] ment, he has a right to have his title to eject tri[illegible] that suit.

In such a suit, after defendants' statement is file[illegible] plaintiff is not at liberty, without any leave fro[illegible] Court, to withdraw his original claim, and subst[illegible] one for enhanced rent.

Garth, C.J.—BOTH the lower Courts [illegible] pear to have thought that the provisions [illegible] Act VIII. (B. C.) of 1869 are applicable to th[illegible]

case. But, if the Judge's finding that the land in dispute forms part of one of the principal streets in Monghyr is correct, that Act can have no application, as it relates only to agricultural holdings.

As the case was first laid, it was a suit for ejectment from 8 cottahs 9½ dhurs situated in a bazar, the property of Government, and to recover mesne-profits for the occupation thereof from the date of suit.

After the defendant's statement was filed, a most irregular course appears to have been taken on behalf of Government. The Collector filed a statement, apparently without any leave from the Court, in which he virtually withdrew his original claim in the plaint to eject the defendant, and substituted in its stead a claim against him for enhanced rent.

The Moonsiff, before whom the plaint was filed, very properly rejected the supplemental or substituted claim, but allowed it to remain on the record, and settled the issues in accordance with the original plaint and the defendant's statement; but the Moonsiff, who afterwards tried the case, seems to have disregarded these issues, and to have allowed the trial to proceed upon an entirely new basis.

It seems to have been assumed, both by him and the Lower Appellate Court, that the provisions of Act VIII. (B. C.) of 1869 were applicable to a case of this nature, and hence the confusion which is apparent in the judgment of both the lower Courts, owing to the attempt to apply a special law to a case which does not come within its provisions.

It is not denied that the Government is the proprietor of the soil on which the building in the occupation of the defendant stands, and the real point at issue between the Government and the defendant is, whether the Government as proprietor can eject the defendant from the land and take possession thereof, leaving him to remove the house he has erected.

If it be decided that Government is entitled to take possession of the land, it follows, as a result of such determination, that the Government can make its own terms with the person in occupation, and the cardinal issue in the case is, "Is the Government entitled to eject the defendant and to take possession of the land in dispute?" To determine this question, it will be necessary to consider the evidence as to the origin of the tenancy and the conditions under which the tenant erected the building. The mere fact that a building has been erected on the land with the consent of the proprietor of the estate does not give to the occupant a right to hold the land perpetually at the same rate as is contended by the defendant. And if the proprietor, with an ultimate view of raising the rent, brings a suit for ejectment, he has a right to have his title to eject determined in that suit.

The issues, therefore, upon which the rights of the parties depend, have not been properly tried in the Court below, and we consider that we ought to remand the case to the Moonsiff's Court with directions that he shall try the following issues, and that the parties be at liberty to adduce any evidence they think proper upon the trial :—

1st.—Was the Government entitled, at the time of the commencement of this suit, to eject the defendant and to take khas possession of the land in dispute ?

2nd.—If so, whether the Government is entitled to any and what amount of mesne-profits ?

The costs will abide the ultimate result.

The 24th February 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Special Appeal—Questions of Evidence—Error of Law—Comparative Credibility of Witnesses.

Case No. 639 of 1875.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Tirhoot, dated the 19th December 1874, reversing a decision of the Moonsiff of Tajpore, dated the 31st July 1874.

Mr. W. Mackenzie (Plaintiff), *Appellant,*

versus

Jowahir Mahtoon and others (Defendants), *Respondents.*

Mr. C. Gregory and *Moonshee Serajul Islam* for Appellant.

Baboo Kalee Kishen Sen for Respondents.

The High Court cannot interfere in special appeal with a Lower Appellate Court's opinion as to the comparative worth of the testimonies of two witnesses.

Where the Lower Appellate Court disbelieved the evidence of a witness, solely because he, being a naib.

patwaree, signed certain dannabundee papers as a patwaree, it was considered to have committed an error of law which warranted a remand by the High Court in special appeal.

THIS was a suit to recover rent for 1280 and part of 1281 F. S. The plaintiff claimed rent at the rates which were paid by the tenant during the previous year. He is the lessee of a half share of the estate, and it is said was forced to bring his suit in its present shape.

The defendants admit their tenancy, but deny the rates claimed by the plaintiff. This was the point on which the parties went to trial.

The first Court found for the plaintiff, and gave him a decree.

The Subordinate Judge reversed that decision and dismissed the suit, except so far as the defendants admitted liability.

The first objection taken in special appeal is, that the Subordinate Judge is wrong in disbelieving the evidence of Joyram on behalf of the plaintiff, because he has not filed the jummabundee papers of 1271 to 1273 and 1279. But, as a matter of fact, the Subordinate Judge does not seem to me to have rejected the evidence of this witness on that ground. It is clear from what he has himself recorded in the earlier part of his judgment that the jummabundee papers of 1279 were filed. He could not, therefore, mean to reject the evidence of Joyram in respect of those papers. What he refers to is the jummabundee of the previous years. His meaning is, I take it, that, whereas this witness, claiming to have been ticcadar in 1279, and gomashta collecting rents in 1271, 1272, and 1273, is not able to substantiate his evidence as to what he collected in 1279 by showing that the sums then collected were the same as were always collected as proved by the jummabundee papers of 1271, 1272, and 1273, therefore his evidence is untrustworthy. If this was all that the Subordinate Judge had said, perhaps there would have been something in the objection raised by the appellant's vakeel, because, in the years 1271, 1272, and 1273, Joyram was not ticcadar, but gomashta only; and it might have been said that, whereas he had the papers of 1279 and filed them, he had no power over those of 1271, 1272, and 1273; and that was the reason why he did not file them. But the Judge goes on and says that this is not the only reason for disbelieving his evidence, but his evidence is opposed to that of the Patwaree Ajoodhya Doss. This was the person who was said to have made out the jummabundee pa[illegible] 1279. In his examination, however, h[illegible] tinctly denies the correctness of the [illegible] therein recorded, and gives his evide[illegible] support of the rates admitted by the de[illegible] ant. Supposing, therefore, that the Su[illegible] dinate Judge was not exactly correct i[illegible] of his reasons, certainly nothing can be [illegible] against his other reasons for disbelie[illegible] Joyram. If he believed Ajoodhya D[illegible] Patwaree, it was impossible for him to [illegible] lieve Joyram Ticcadar. This is the Su[illegible] dinate Judge's opinion on the evidence, [illegible] is, therefore, a question of fact with w[illegible] this Court cannot interfere in special ap[illegible]

The other objection is as to that pa[illegible] his judgment where he says that the jum[illegible] bundee papers filed by the defendant b[illegible] the signature of the manager of the C[illegible] of Wards, and that their validity is undo[illegible] ed. This has no bearing on this part of [illegible] case, because, in recording that opinion, [illegible] Subordinate Judge had already rejected [illegible] evidence of Joyram. So that whether [illegible] Subordinate Judge was right or wrong [illegible] saying that the jummabundee of the defe[illegible] ant bore the signature of the manager of [illegible] Court of Wards does not affect the cred[illegible] lity of the witness upon whose evidence [illegible] plaintiff's case rests.

The next objection to the judgment of [illegible] Lower Appellate Court is with regard to [illegible] rent payable in kind. The Subordi[illegible] Judge disbelieves the evidence of the pla[illegible] iff's witness, Achumbit Lall, on the gro[illegible] that he had signed the dannabundee pa[illegible] as patwaree, whereas it appears from [illegible] deposition that he was only a naib-patwa[illegible] I must say that this is no reason a[illegible] Everybody is aware that a patwaree a[illegible] a naib-patwaree perform the same du[illegible] the one being the deputy of the other. A[illegible] a naib patwaree is expected to do, and in f[illegible] does, the duty of a patwaree in his absen[illegible] And the dannabundee papers, containing [illegible] estimate of what the ryot was to pay in k[illegible] and what the landlord was to receive, m[illegible] be as correct under the signature of a n[illegible] patwaree as they might be when signed [illegible] the patwaree. As this is the only reas[illegible] that I can discover for the Subordin[illegible] Judge's reversing the order of the first Co[illegible] on this point, I think he has committed [illegible] error in law which necessitates a remand [illegible] this case for a further inquiry. If, on t[illegible] remand, the Subordinate Judge considers th[illegible] the evidence of Achumbit Lall is not to [illegible] believed, that is one thing. But it seems [illegible] me that he is not justified in disbelieving h[illegible]

ence, not for any thing in his deposition, for any thing opposed to it in the evi-ce of other witnesses, but simply because being a naib-patwaree, signed the danna-dee papers as patwaree. On this point case will be remanded. On the other, special appeal will be dismissed.

make no order as to costs.

The 24th February 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

rchaser from Mortgagor—Notice of Fore-closure—Objections.

Case No. 426 of 1875.

ecial Appeal from a decision passed by the Judge of Patna, dated the 22nd December 1874, affirming a decision of the Officiating Moonsiff of that District, dated the 30th March 1874.

Mitterjeet Singh (Defendant), *Appellant,*

versus

Mookh Lall Singh and another (Plaintiffs), *Respondents.*

Mr. M. L. Sandel and *Baboo Roop Nath Banerjee* for Appellant.

Baboo Bykunt Nath Doss for Respondents.

A purchaser of mortgaged property from the mort-gor is entitled to notice of foreclosure, and, if sued for ssession by the mortgagee, may defeat the suit if able plead successfully that notice was not served.

If such objection, however, is not pressed, or being ressed is decided against the objector, it cannot be ained subsequently in a later suit brought by the mort-gee's representative.

The plaintiffs in this case sue to recover possession of certain lands, which they allege were purchased by them from one Gurbur Singh, who was a mortgagee of Bheenuck, the original proprietor. The mortgage was foreclosed in 1856; and it is said, and as a matter of fact the Judge has found, that pos-session passed by the mortgagee. The Judge distinctly says in his decision that he consi-ders that the plaintiffs have given evidence sufficient, if it be accepted, to establish the fact of their possession of the property at a period so late as to bar the operation of the law of limitation, and that no good reason for rejecting that evidence has been shown to us.

The defendant likewise claims the pro-perty by purchase from Bheenuck under a kobala, dated the 22nd of December 1848.

There appears to have been some dispute as to the identity of these lands. But it has been decided by both the lower Courts, and, in fact, there is no doubt that it must be so, that the lands are identical, otherwise the parties to the suit would have been fighting for nothing. The Judge has found that the plaintiff's purchase and the title of their vendor Gurbur were made out, and he has upheld the finding of the first Court, and given the plaintiffs a decree.

Now, it is contended, and it is the only objection urged before me, that the defendant being a purchaser from the proprietor Bhee-nuck, the mortgagor, he was entitled to a notice of the foreclosure by the mortgagee. It appears from the record that in 1863, that is to say, some years after the foreclosure of the mortgage, the mortgagee brought a suit to recover possession against the heirs of Bheenuck, the mortgagor and the defendant No. 1 in this case, and obtained a decree. In the written statement in that case the objection now taken was urged, namely, that notice of the foreclosure was not served on the representatives of the mortgagor. No doubt there is nothing in the decision exact-ly stating that that objection was decided against the defendant, but, as a matter of fact, it must have been so, because, if it had been proved, the case of the plaintiff would have failed. But the fact of the decision being in his favour shows that the objection was not pressed, or, if pressed, it was decided against the defendant. If that be so, it seems to me that the special appellant cannot now raise the objection in this case, inasmuch as he had opportunity before, more than ten years ago, to raise the objection, which he did; and so far as I understand the judgment in the case on that date, the point was decided against him. The Judge does not mention the objection as having been taken before him, though it is to be found in the petition of appeal to his Court, and I suppose it was not pressed.

This is the only objection taken in special appeal, and, as it fails, the appeal must be dismissed with costs.

The 25th February 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Objections—Special Appeal.

Case No. 900 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 28th January 1875, affirming a decision of the Officiating First Moonsiff of that District, dated the 1st April 1874.

Ramanoogra Sahoy and others (Defendants), *Appellants,*

versus

Mussumat Dhondia (Plaintiff), *Respondent.*

Baboo Roop Nath Banerjee for Appellants.

Baboo Boodh Sen Singh for Respondent.

Where a finding of both the Courts below is objected to in special appeal, on the ground that it is not supported by any evidence on the record, the objection ought to be stated in distinct words in the petition of appeal.

THE objection taken in special appeal to the finding on evidence of both the Courts below, "that the plaintiff did not resign her jote in "1276 as stated by the defendant, and that "the tenure held first by her husband and "afterwards by herself was a mourosee one," is that there is no evidence at all on the record showing that it was a mourosee jote. Now, the Subordinate Judge distinctly says that it is established by the plaintiff's witnesses that the land in suit is her mourosee jote, and if the defendants wished to traverse that part of the Subordinate Judge's decision, they ought to have stated their objection in distinct words. There is no ground in the petition of special appeal which will cover an objection of this kind.

The special appellants' pleader has referred me to the third ground, which he considers will enable him to argue it. That ground is in the following words: "The plaintiff has "acquired no right, or, if she has any right, "that right is lost by her self-conduct." And assuming that this means "her own conduct," the ground cannot, in any possible way, be understood as objecting to the finding of the Subordinate Judge that the jote was a mourosee one.

The special appeal is dismissed with costs.

The 25th February 1876.

Present:

The Hon'ble F. A. Glover. *Judge.*

Rent in Kind—Jurisdiction—Plaintiff's Witnesses—Undecided Issue—Remand.

Case No. 1107 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 29th December 1874, affirming decision of the Moonsiff of Behar, dated the 9th February 1874.

Mullick Amanut Ali and others (Plaintiffs), *Appellants,*

versus

Ukloo Pasee (Defendant), *Respondent.*

Mr. R. E. Twidale and *Moonshee Abdul Baree* for Appellants.

Baboo Boodh Sen Singh for Respondent.

A suit for rent in kind is cognizable under Act VIII. (B. C.) of 1869.

A plaintiff's witnesses may not be believed, but they cannot be ignored.

Where the lower Courts have come to no decision on a point raised, the plaintiff in special appeal has a right to a remand for the point to be tried, even though it be trifling.

A PRELIMINARY objection has been taken to the hearing of this appeal, on the ground that the suit is of the nature cognizable by a Court of Small Causes. It appears to me that it is not so. The suit is for value of crops no doubt. But it is essentially a suit for rent claimed for part ownership of a certain date and palm trees, and over certain crops. The suit is, therefore, for rent in kind and was clearly cognizable by the Court under Act VIII. of 1869; it appears moreover from the record that it was heard with the consent of all parties under that Act. This disposes of the preliminary objection.

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en, as to the appeal, the Subordinate affirms the decision of the Moonsiff e ground that Saneechur Mallah, who only witness examined by the plaintiffs ove their case, has been rightly held by Moonsiff to be untrustworthy. If this a fact, there would have been an end of matter. But it has been pointed out to and it cannot be denied, that, besides eechur Mallah, there were two witnesses, ely, Pershadee Lall and Jetoo Roy, and ra papers besides. At all events these witnesses were examined on the part of plaintiffs, and their evidence is on the d. A decision which clearly ignores evidence of two out of three witnesses not be said to be a satisfactory one. If Subordinate Judge had referred to these witnesses and expressed an opinion that were not to be believed, that would been another thing. But he ignores altogether. He says that there is no r witness on the part of the plaintiff but eechur Mallah. Before he decides the tion as to the plaintiffs' right, he must ose of the evidence of all their wites.

Then there is another point on which no ision was come to by either of the Courts w. Part of the defendant's statement that of the produce of these trees the ntiffs were entitled to a certain small e, and that the larger portion thereof due to a man named Neamut as his right, consequence of his having planted the s. This was a matter for the defendant rove, because he denied that the plaintiffs a right to sue for the produce of the s claimed by them; and if it were not ved that Neamut took the larger share, in sequence of having planted the trees, the ntiffs would be entitled to a great deal e than was declared to be theirs. The ential point for decision, therefore, is ether Neamut had such right as the endant alleges he had. The matter, no bt, is a very trifling one, still, as the appelts desire it, they have a right to a remand have this question considered. They ught evidence to prove the quantity of produce which has not been considered. ey have likewise another point in their our, namely, that, if Neamut has no right the share alleged to be his, the plaintiff ll be entitled to all that he asks for.

The case must go back to the Court of st instance with reference to the above marks.

Costs will follow the result.

The 26th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Putnee Sale—Service of Notice—Object of Sale-notice—"Sufficient Plea" for cancelling Sale.

Case No. 295 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 27th April 1874.

Gouree Lall Singh Deo Bahadoor (Plaintiff), *Appellant,*

versus

Joodhishtir Hajrah and others (Defendants), *Respondents.*

Baboos Bhowanee Churn Dutt and *Umbika Churn Bose* for Appellant.

Baboos Mohinee Mohun Roy and *Kalee Prosunno Dutt* for Respondents.

In a suit to set aside the sale of a putnee talook for arrears of rent, in which it was shown that the notice of sale, after having been placed for a time on the cutchery of the farmer of the talooks in the mofussil, was then removed and served personally on the defaulter who lived in a distant mehal, HELD that as the object of serving a notice of sale was both to acquaint the defaulter of its approach and to enable the under-tenants on the talook to preserve their own rights, and as both these objects were attained in this case, a "sufficient plea" had not been made out for setting aside the sale, although the course prescribed by law had not been precisely followed.

Mitter, J.—THIS is a suit for the reversal of a putnee sale under Regulation VIII. of 1819. The claim is based upon two grounds, *viz.:* (1) that there was no arrear of rent

due from the plaintiff on the day of the sale, the same having been paid to the zemindar two days before the day of sale; and (2) that the notification of sale was not duly published according to section 8 of Regulation VIII. of 1819.

The lower Court has dismissed the suit. Upon the first point the lower Court has found that the allegation of payment of rent two days before the day of sale is not true, and that the *dakhilla* produced to establish that payment is not genuine. As regards the publication of the notice of sale what the lower Court finds is this—that it was first stuck up in the cutchery of the ijaradar (the mehal having been let out in ijara by the putneedar), but the gomashta of the ijaradar having refused to grant a receipt of the service of the notice to the peon who took it, it was taken down and subsequently personally served upon the plaintiff, the putneedar. The lower Court having come to these conclusions of facts dismissed the suit.

On appeal, the correctness of these conclusions of facts has been contested upon the ground that they are against the weight of the evidence on the record. I do not think that this contention ought to prevail. I am quite satisfied with the reasons given by the lower Court in support of these conclusions; and I do not think that we ought to disturb his findings in appeal. We must, therefore, accept them as giving the true facts of the case.

The next question that has been raised in appeal before us is that, accepting these findings of fact as correct, still the sale cannot stand, as the notification of sale was not published in the manner indicated in clause 2, section 8 of Regulation VIII. of 1819. The plaintiff does not deny that two notices, as required by this clause, were stuck up in accordance with law in the cutcheries of the zemindar and the Collector; but his case rests upon the ground that no notice was published as also required by the same clause in the mofussil. The clause in question first of all lays it down that the notice of sale should be stuck up in the cutchery of the Collector. Then it further provides: "A similar notice shall be "stuck up at the Sudder cutchery of the "zemindar himself, and a copy or extract of "such part of the notice as may apply to "the individual case shall be by him sent, "to be similarly published at the cutchery "or at the principal town or village upon "the land of the defaulter. The zemi "shall be exclusively answerable for "observance of the forms above descri "and the notice required to be sent into "mofussil shall be served by a single p "who shall bring back the receipt of "defaulter or of his manager for the sa "or, in the event of inability to procure "the signatures of three substantial pers "residing in the neighbourhood in atte "tion of the notice having been brou "and published on the spot."

Now it is evident from the facts of case that the form prescribed above for publication of the notice in the mofussil not been strictly complied with. Becau the notice, though at first stuck up in cutchery of the ijaradar, was, after a sh time, taken down and personally served u the defaulter at his house, which is at so distance from the putnee mehal. Therefo the question which we have to determine whether this defect is such as to entitle defaulter to ask the Court to reverse sale upon that ground alone. In order arrive at a satisfactory conclusion upon question, we must first determine what the object for which this provision as to publication of this notice in the mofu has been made; because, if it be simply give notice of the sale to the defaulter, is clear that in this case we ought not give effect to the contention of the plain who has got a more direct notice of the sa as it was personally served upon him. has been decided by Sir Barnes Peacock, C. in a case reported in page 242 of volume, Weekly Reporter, that a putn sale should not be set aside for mere form defects in the publication of this notice, it be proved that it has been served up the defaulter. This case has been quot with approbation by their Lordships of t Judicial Committee of the Privy Coun in the case of Ram Sebak Ghose *versu* Mun Mohinee Dassia, reported in page 11 Weekly Reporter, Volume XXIII. Th same view of the law has been taken by Division Bench of this Court in the ca reported in page 133, Weekly Reporte Volume XXIV.

Now it is clear that one of the objects this provision is to give notice of the sal to the defaulter, and, so far as that object i concerned, the plaintiff, as I have remarke above, has no valid ground to complain But the question is, is that the sole object? I do not think it is. If it were the sole object,

we should have naturally expected that handing over the notice direct to the defaulter or his agent would have been laid down as the ordinary and the principal mode of service, and the sticking-up of the notice in his cutchery, or the publication of the same "at the principal town or village upon the land," would have been laid down as the substituted mode of service to be resorted to, if it was impracticable to effect the service in the first-mentioned mode. Then it must be remembered that there is no other provision in the Regulation of advertizing the sale in the mofussil except the one under consideration. Then it also must be remembered that important privileges have been given to the under-tenants by the Regulation to protect their rights, and there is no other provision in it of giving notice of the sale to them than the one indicated in the extract I have made from the Regulation. The letter of the law also leads to this conclusion, because it speaks of the notice of sale being *published* on the spot. It appears to me from these considerations that the object of this provision in the Regulation is not only to give notice of the sale to the defaulter, but also to under-tenants, and further to advertize the sale "on the spot" for the information of the intending purchasers.

We have, therefore, next to consider whether the defects in the publication of the notice of sale in the mofussil in this case have been such as to defeat the object mentioned above. Section 14 of this Regulation, which gives to the defaulter the right of contesting the validity of the sale in a Civil Court, provides that the sale should be reversed upon "a sufficient plea" being established. Has the plaintiff established "a sufficient plea" in this case which would entitle him to ask the Court to set aside the sale? It has been found that the notice of the sale was stuck up in the ijaradar's cutchery, and was not taken down until after some time. That the peon who took it there asked the gomashta of the ijaradar to grant a receipt of the same, and there was some conversation between them as to whether he (the gomashta) was the right person who should give this receipt; and on his finally refusing to give it that the notice was taken down and brought away to be personally served upon the defaulter. The plaintiff has not established any circumstance in this case to show that this was not sufficient publication of the notice of the sale in the mofussil. He does not state that, in consequence of this defective publication of the notice, there was not a sufficient gathering of intending purchasers at the time of the sale. Nor does he complain that his under-tenants were ignorant of the impending sale of the parent talook, and were therefore prevented from depositing the arrear of rent to stay the sale. He in his plaint puts the same valuation upon his putnee mehal which it fetched at the auction-sale. Upon the whole I am not prepared to say that the defects established by the plaintiff in the *manner* of the publication of the sale-notification in the mofussil are such as to amount to "a sufficient plea" within the meaning of section 14 of Regulation VIII. of 1819.

It remains to notice a case reported in page 447 of the 17th volume of the Weekly Reporter, upon which the learned pleader for the appellant laid great stress in the course of the argument. In that case there was no attempt made by the zemindar to publish the notification of sale in the mofussil. There was further a very grave irregularity in sticking up the notice of sale in the Collector's cutchery, and it was held that these defects were sufficient to vitiate the sale. I do not think that any inflexible rule of law was laid down there that any departure from the forms laid down in clause 2, section 8 of Regulation VIII. of 1819, would be sufficient to entitle the defaulter to set aside the sale. What was virtually held in that case was that the irregularities established there were sufficient under law to vitiate the sale.

The result therefore is that this appeal must be dismissed with costs.

Glover, J.—Had it not been for the strongly expressed opinion in the case referred to by Mr. Justice Mitter, in which case, moreover, the judgment was to a certain extent approved of by the Privy Council, I should have thought that the words of the Regulation were imperative, and made all sales void where there had been no proper service of notice in the mofussil cutchery; but after these decisions I do not see how I can retain my opinion, and I am, therefore, not prepared to dissent from the judgment of my learned colleague.

The appeal must be dismissed with costs.

The 3rd February 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Voluntary Conveyance void against Creditors—Prior Claim.

Cases Nos. 110 and 111 of 1875.

Special Appeals from a decision passed by the Additional Judge of Jessore, dated the 30th September 1874, reversing a decision of the Moonsiff of Nurrail, dated the 31st December 1873.

Raicomul Dossia and another (Plaintiffs), *Appellants*,

versus

Indramonee Dabea and another (Defendants), *Respondents*.

Baboo Motee Lall Mookerjee for Appellants.

Baboo Shoshee Bhusun Dutt for Respondents.

Where a claim to an estate, based on a deed of conveyance, was declared in one suit to be valid as between the parties to the conveyance, but was set aside in a second as being fraudulent and invalid against the creditors of the party conveying away the estate, HELD by the High Court that, though the first finding established the claim of the original proprietor against that of the persons who contested it in the first suit, it could not bar the creditors of that proprietor from making good their rights under the second finding that the deed was a voluntary conveyance.

Garth, C. J.—We think that the Lower Appellate Court has made a mistake in this case.

When the true nature and effect of the former suit is properly considered, it is obvious that the judgment in the first suit cannot possibly affect the rights of the parties in this; and it is equally clear that the judgment in the second suit, which was between the same parties, and raised precisely the same question as is raised in the present suit, does operate as an estoppel here.

The first suit was brought by Indramonee against Pearymohun to recover a four-anna share of the property in question. Her claim was founded upon a deed, by which the property was conveyed to her by Prosunno, and the defendant Peary m set up a title in that suit adverse to sunno. The question, therefore, was, wh Prosunno's title under which Indram claimed, or Pearymohun's was to pr and the Court decided in favour of Prosu title.

But, then, in the second suit, an entirely ferent question arose. Raicomul, the pl iff in that suit, was a creditor of Prosu and Raicomul, alleging that the convey from Prosunno to Indramonee was fr lent, and made for the purpose of prote Prosunno against his creditors, brought second suit against Indramonee for the pu of trying the question whether the dee *bonâ fide* and made for good consider or whether it was a mere voluntary co ance, and void as against creditors.

This question was decided in that and a decree was made in favour of comul, on the ground that the deed, th good between Prosunno and Indram was a voluntary conveyance, and voi against Prosunno's creditors.

The rights of the parties having thus b determined in that suit, the present suit brought for the purpose of protecting title and possession of Raicomul as ag Indramonee; and the same question a in this, as in the second suit, *viz.*, whethe conveyance is valid, not as between sunno and Indramonee, but as bet Indramonee and Prosunno's creditors. present suit, therefore, raises precisely same question which was decided in second suit, and raises it between the s parties, and we think it clear, there that the judgment in the second su binding upon the parties in this.

The judgment in the first suit on other hand cannot affect the rights of parties in this; because, not only were parties different, but the question raised of a totally different character, *viz.*, whe Prosunno's title, under which Indram claimed, was good as against Pearymoh title.

The Lower Appellate Court, therefore, been wrong in deciding that the first operated by way of estoppel in the pre suit, and we consider that its judgm should be reversed, and the judgment the Moonsiff confirmed with costs in all Courts.

It is admitted by the pleaders of b parties that the appeal No. 111 of 1875 be governed by this decision. The sa order will, therefore, be made in that case.

The 14th February 1876.

Present:

he Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Partnership Accounts—Limitation.

Case No. 626 of 1875.

cial Appeal from a decision passed y the Judge of East Burdwan, dated he 8th February 1875, affirming a decision of the Subordinate Judge of that District, dated the 29th August 1873.

Khoodee Ram Dutt (Defendant), *Appellant,*

versus

Kishen Chand Golecha (Plaintiff), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

oos Sreenath Doss and *Nil Madhub Bose* for Respondent.

a suit for the recovery of a balance said to be due joint business account, in which the sole issue nally raised was whether one partner was bound n acknowledgment said to have been made by the r: HELD that the new issue, whether the second y had the status of a partner at all, and was orized to make the said acknowledgment, could for the first time be raised in appeal: HELD, also, s. 20, Act IX. of 1871, does not apply to partner-account.

Glover, J.—THIS was a suit to recover balance due on a joint business account ween the plaintiff and the defendant, who members of a firm carrying on business Cutwa and Calcutta.

The suit was brought on an adjustment of ount of the firm signed by one of the ties Kali Doss on the 3rd Bysack 1279. The Court of first instance, when the case s first heard, found, with reference to the endant Khoodee Ram's objection, that he s only an agent, and not a partner, that he s liable as a partner, and gave a decree inst him, from which he appealed to the dge and succeeded in getting the Subordite Judge's order reversed, both on the ound of limitation and likewise on the ound that he was not a partner.

The High Court, on special appeal, manded the case, pointing out to the bordinate Judge certain evidence with reference to the allegation of partnership which the Lower Appellate Court had not taken into consideration.

On remand the case went before the District Judge, and he has tried it *de novo.* He has found on the evidence that Khoodee Ram was a partner in the firm on the date the acknowledgment was signed by Kali Doss.

It is now objected by the pleader for the appellant that supposing that this Court is, in special appeal, bound to take this as a finding of fact upon evidence that Khoodee Ram was a partner, still there has been no finding as to the objection raised by Khoodee Ram in the original suit that Kali Doss had ceased to be a partner in the firm before the date on which the acknowledgment was signed by him.

It appears to me that it is too late to take this objection at the present stage of the proceedings. We have looked at the written statement on the record, and we do not find in it any allegation by Khoodee Ram that Kali Doss had ceased to be a partner before the date of this acknowledgment. If that had been a part of the appellant's case, he ought to have had, and doubtless would have had, an issue fixed regarding it, and have had the point decided. He was, however, content to go to trial upon the broad issue, not whether Kali Doss was a person in a position to give the acknowledgment, but whether he, Kali Doss, being a partner at the time, Khoodee Ram was bound by Kali Doss's act. No issue was fixed upon the question of Kali Doss's liability, no evidence was taken, and no decision come to. It seems to have been agreed on both sides that the question to be decided was the liability of Khoodee Ram; the liability of Kali Doss was never called into question.

Then it is said that the Judge is wrong on the point of limitation. Section 20, Act IX. of 1871, provides that no acknowledgment in respect of a debt will take the case out of the operation of the Limitation Act, unless the acknowledgment is contained in some writing signed, before the expiration of the prescribed period, by the party to be charged therewith or by his agent generally or specially authorized in this behalf. It seems clear that this section cannot apply to partnership-accounts or to cases where one partner, by the ordinary rules of partnership, is able to bind his co-partner, and still less so to the particular suit now before us, which is provided for distinctly by

No. 62 of Schedule II. of the Limitation Act, where it is said that, "for money payable to the plaintiff, for money found to be due from the defendant to the plaintiff on accounts stated between them," limitation begins to run from the date on which the accounts are stated. If section 20 apply to a case of this sort, I do not see how it is possible for one partner to bring a suit upon an acknowledgment made by another co-partner of the firm.

It seems to us that, upon both the points which have been argued before us, the Judge of the Court below was right, and that this special appeal should be dismissed with costs.

Mitter, J.—I concur.

The 14th February 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Enhancement of Rent—Mokurruree Tenure.

Case No. 2499 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 5th June 1874, modifying a decision of the Moonsiff of that District, dated the 13th November 1873.

Roy Wooma Nath Chowdhry and others (Plaintiffs), *Appellants,*

versus

J. A. Davis (Defendant), *Respondent.*

Mr. M. L. Sandel and *Baboo Sreenath Doss* for Appellants.

Baboos Aubinash Chunder Banerjee and *Chunder Madhub Ghose* for Respondent.

In a suit in which arrears of rent at an enhanced rate were claimed for land which defendant's predecessors had cleared from jungle, on which they had built dwelling-houses, and which they had held for seventy years at an unvarying rent, HELD that, though these circumstances were conclusive as to the mokurruree quality of the tenure, yet, as plaintiff and defendant were agreed as to the extent of land originally leased out to defendant's predecessors, but plaintiff now contended that defendant held more land than he was originally entitled to, the Court below was bound to find whether the plaintiff's contention as to the extent of the land was correct.

Glover, J.—THIS was a suit to recover arrears of rent at an enhanced rate on certain land which is admittedly comp in the compound of a bungalow in the o pancy of the defendant.

The defence was that for nearly sev years the land had been held on a mo ruree tenure, and that no increase of had ever taken place, although the point been more than once mooted between landlord and tenant; that the land, w originally given, was in a state of t jungle; and that the lessee, Mr. Glass, cle and enclosed it, and built thereon his dw ing house.

The Moonsiff decided that, although plea of mokurruree set up by the defen had not been proved, yet, as the plaintiff failed to prove the grounds of enhancem his suit must be dismissed. He raised issue as to whether the land held by defendant consisted of 35 beeghas claimed by the defendant, or 52 beeg the area stated by the plaintiff. The M siff found that the plaintiff had not pr his allegation as to the larger area.

On appeal the Judge did not go into cross-appeal of the plaintiff as to whe the Moonsiff was correct in finding that plaintiff had failed to prove the ground enhancement, and which, we suppose, mus considered as including the question whe the area of land was 35 beeghas 52 beeghas. It is true that the Ju does not distinctly mention this as one the grounds. But it was clearly one wh might have been legally taken, and we m presume that it was taken.

With regard to the other point the Ju found that the defendant and his predeces had held continuous possession of this of land which was originally granted building purposes after clearing the jun and had never paid any thing more than unvarying rate of rent; and that they always paid that rent with the consent the zemindar. The Judge held, therefo that it was fairly presumable that the defe ant's holding was, when it was grant a mokurruree one. On this part of the c we certainly see no reason to interfere wh we find circumstances such as these, name that a piece of jungle land is cleared by person whom the zemindar has located the ground; that, on the land so cleared, house is built, and that in that house t lessee and his successors live for year paying for it the same rate of rent; tha when questions arise between the parties to the rate of rent to be paid, the point

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always given in favour of the tenant; when, as we see, this state of things goes on for seventy years without objection, it is only fair to presume that the original holding was under a mokurruree grant, although the document of title may not be now forthcoming, and that the rent thereof cannot be enhanced.

The appellant's pleader argued that there was an analogy between this tenure and a jungleburi one, and that, as such a tenure was not exempted from enhancement, neither was this; but I see no analogy between the two cases. A person clearing land under a jungleburi pottah does it of course for the purpose of raising crops on the land cleared, and every year his profits increase with his clearings. But in this case the land leased was intended to be used, and has been used throughout, solely for dwelling purposes.

On one point, however, we think that the Judge's decision is defective, namely, with regard to the area of the land. It is not as if the defendant was claiming to hold a certain quantity of land under a pottah which he could not produce, but which pottah was said to contain boundaries. In such a case it might possibly have been said that, although the quantity of land named in the pottah was so much, there was in reality a great deal of extra land included within the boundaries specified in the lease, and that the lessee was entitled to all the land within those boundaries although a lesser area might have been entered in the lease. But the defendant never set up this case; in his written statement he distinctly limits the amount of land he claims to 35 beeghas and 14 cottahs. If, therefore, he is proved now to be in possession of 52 beeghas, it is clear he has got something which, according to his own case, the original pottah never gave him, and for which it is quite possible that the zemindar may be in a position to demand an enhanced rent. The case must go back on this point. The Judge of the Court below will decide that part of the appeal made to him from the Moonsiff's decision which referred to the area of the land held by the defendant. The Moonsiff held that the plaintiff had not been able to prove that the defendant held any thing more than 35 beeghas. That is the question which the Judge has to decide upon the evidence on the record.

The appeal will be dismissed, so far as the mokurruree title is concerned, with costs. The costs with regard to the remaining part will follow the result.

The 17th February 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Forfeiture—Denial of title.

Case No. 1270 of 1875.

Special Appeal from a decision passed by the Officiating Judge of West Burdwan, dated the 18th March 1875, affirming a decision of the Moonsiff of Bissenpore, dated the 29th April 1874.

Sreemuttya Ahullya Debia (Defendant), *Appellant*,

versus

Bhyrub Chunder Pattro and others (Plaintiffs), *Respondents*.

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Troyluckho Nath Mitter for Respondents.

In a suit for recovery of khas possession, in which it was pleaded that defendant, who was plaintiff's tenant, had forfeited her tenancy by denying the plaintiff's title in a former suit, which he had brought against her, HELD that it was not enough for the plaintiff to bring forward merely the judgment of the Court in the former suit, but that it was absolutely necessary to show what the statement of the defendant actually was, by proving the statement itself: HELD, also, that, as the plaintiff has neglected his opportunity of proving the above-mentioned statement in pleading to an issue that had been framed in the Moonsiff's Court, he had now no ground for having that opportunity renewed.

Garth, C.J.—WE think that the Lower Appellate Court has decided wrongly in this case.

The plaintiffs sue to recover *khas* possession of certain land on the ground that the defendant, who is the tenant occupying that land under the plaintiffs, has forfeited her tenancy by denying the plaintiffs' title in a former suit which they brought against her for arrears of rent. She is alleged to have done this in the written statement which she made in that suit. In order, therefore, to prove this allegation in this suit, it was absolutely necessary for the plaintiffs to

show what the statement of the defendant actually was; and this could only be done by proving the statement itself. It was not enough for the plaintiffs to bring forward merely the judgment of the Court in the former suit. It was necessary to prove the defendant's actual statement in order that the Court might judge what the defendant really meant to say, and whether what she said amounted to a forfeiture. There was no difficulty in proving this statement, and the issues which were raised in the case by the Moonsiff obliged the plaintiffs to do so, because one of those issues was, "whether the defendant's tenancy will prevail against the plaintiffs, and whether the latter are entitled to *khas* possession." Now the question whether the latter, that is, whether the plaintiffs, were entitled to *khas* possession, depended entirely on this alleged forfeiture. Therefore the latter part of that issue raised a mixed question of law and fact, *1st*, what had the defendant actually said or done; and, *2ndly*, whether what she said or did amount to such a denial of the plaintiffs' title as to work a forfeiture.

The Courts below appear to have taken it for granted that, in the former suit, the defendant did really deny the plaintiffs' title; but, on looking at the evidence which was before them, we find no legal proof whatever of anything having been said or done by the defendant which could be construed into a cause of forfeiture.

Under these circumstances, we cannot but arrive at the conclusion that both the lower Courts were wrong, and we the more readily come to this decision, because here, as in England, the Courts always lean strongly against a forfeiture of this kind; and, if a plaintiff comes into Court, relying upon such a forfeiture, he must prove it strictly.

But then the plaintiffs say: "Give us another opportunity of proving our case, by directing the trial of an issue as to whether a forfeiture has been worked." Why should we do that when there was an issue in the case which raised that very question before the Moonsiff? The plaintiffs had ample opportunity of proving their case in the Court of first instance, and, having failed to do so, they have no ground for asking to have that opportunity renewed.

We therefore reverse the judgment of the lower Courts, and dismiss the plaintiffs' suit, so far as regards their claim to *khas* possession. The respondents will pay the costs in all the Courts.

The 17th February 1876.

Present:

The Hon'ble F. B. Kemp and C. Po
Judges.

**Mortgage—Execution-sale—Immoral Lo
Limitation—Minor's Responsibility for D**

Cases Nos. 232 and 267 of 1874.

*Regular Appeals from a decision passe
the Subordinate Judge of Sarun,
the 4th August 1874.*

Mussamut Anooragee Kooer and o
(Defendants), *Appellants,*

versus

Mussamut Bhugobutty Kooer, mother
guardian of Hunooman Pershad and
other, minors (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose
Mohesh Chunder Chowdhry for Ap
lants.

Baboo Taruck Nath Sen and *Moo
Mahomed Yusuf* for Respondent.

Case No. 1630 of 1874.

*Special Appeal from a decision passe
the Judge of Sarun, dated the 23rd
1874, reversing a decision of the
ordinate Judge of that District,
the 5th May 1873.*

Mussamut Sham Soonder Kooer, m
and guardian of Motuk Pershad
(Plaintiff), *Appellant,*

versus

Mussamut Jumna Kooer and others
(Defendants), *Respondents.*

Baboo Taruck Nath Sen and *Moon
Mahomed Yusuf* for Appellant.

Baboo Chunder Madhub Ghose for
Respondents.

Where application was made to set aside a c
under a mortgage-bond, and a sale in execution o
decree obtained under a mortgage-bond, and
recovery of possession of the property mortgaged, on
ground that the loans had been contracted for im
purposes by the father of the plaintiffs, who w
minors, and were not responsible for the obligati
thus incurred, HELD by the High Court that the P

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decision in Vol. XXII., W. R., p. 56, was applicable to the case, and that the creditors were not required to go behind the decree itself, unless clear proof were given of the immorality of the loan:

HELD, also, that, where the application is not merely for reversal of sale, but also for recovery of possession and declaration of title, the limitation of one year did not apply.

Kemp, J.—ONE decision, it is admitted, will govern these two regular appeals. At the request of the pleader for the respondent, Special Appeal No. 1630, in which the respondent in these regular appeals was the appellant, was allowed to stand over for disposal with the regular appeals. Some of the defendants are the appellants in Appeal No. 232, and other defendants are appellants in Appeal No. 267. Some of the properties involved in Regular Appeal No. 232 were properties mortgaged by the father of the minors, plaintiffs, to Sheo Golam. The other property involved in No. 232 is property which was not mortgaged, but which was sold in execution of the personal decree on the mortgage-bond, and purchased by the defendants. The property involved in Appeal No. 267 was property sold in execution of the personal decree, and purchased by the defendant. The mortgage-bond is dated the 26th April 1867. A decree was obtained on the bond on the 4th of December 1867. On the 30th of July 1869, the sale of some of the properties involved in Regular Appeal No. 232 was made, and the sale of the remaining properties involved in that appeal and the properties involved in Regular Appeal No. 267 was made on the 13th September 1869.

A partition-suit is alleged to have been brought by the plaintiff's mother on the 27th July 1869, or three days previous to the first sale in execution when the execution-proceedings were ripe for sale, and a decree for partition was made on the 28th September after all the sales were made which the plaintiffs attempt to set aside. The plaintiffs in this suit appear under the guardianship of their mother Mussamut Bhugobutty Kooer. There is evidence in this case to the effect that this suit has been brought in reality by the father of the minors, and there is very great probability from the circumstances of the case that such is the fact. The suit is for recovery of possession and registration of names in respect of certain shares in certain mouzahs fully detailed in the plaint, to set aside the decree, as also the sale in execution of that decree and the purchases made by the respective defendants in the case.

The Subordinate Judge, Mr. DaCosta, laid down twelve issues in the case. He found that the loan was taken by the father, and that it is not proved that the son Hunooman Pershad, who was born before the loan was taken, benefited by that loan; that the loan was taken for the necessary expenses of the borrower, the father, and he does not believe the evidence adduced by the defendants to show that the money was expended for the investiture of Hunooman Pershad with the Brahminical thread, &c.; that it was for the defendants to have shown that the loan was contracted to meet the pressing necessities authorized by the Shastras, which they have not done. That therefore the plaintiffs are entitled to recover possession of the share of the family-property sued for and to obtain registration of their names; and that the mortgage-bond, the decree, the sale in execution, and the purchase of the said shares by the defendants are void. Wassilat was also decreed with interest thereon from the date on which wassilat may be ascertained to date of payment. The pleaders for the appellants contended that these cases are governed by the Privy Council decision to be found in Volume XXII., Weekly Reporter, page 56, and that, according to that ruling, they were not bound to go behind the decree, as the son was bound to pay the father's debts unless it were clearly shown that such debts were contracted for immoral purposes; that there is no evidence whatever to the effect that these debts were contracted for immoral purposes, and therefore that the suit of the plaintiff ought to have been dismissed following the above ruling. On the other hand, the contention of Moonshee Mahomed Yusuf for the respondent is, that the suits are not governed by the decision of the Privy Council in Volume XXII. From the dates which we have given above it is clear that the bond executed by the father of the plaintiffs, minors, and the decree which was obtained on that bond, are all of dates anterior to the proceedings which were taken on behalf of the minors to obtain a butwara. It is also clear that this suit for a butwara was instituted within three days prior to the sale in execution of the decree on the bond, and we think, after hearing the arguments on both sides, that this case is clearly governed by the above decision in Volume XXII. of the Weekly Reporter. Then, with reference to the nature of the debt, which is the point we have to look at in deciding whether the son is bound to pay the debt or not, the evidence

has been read by the pleader for the respondent. That evidence is of a very unsatisfactory character. It is alleged that the father borrowed this money for the purpose of making presents to wrestlers or *pahlwans*, and one witness has gone to the length of stating that the father does not reside with his minor sons. There are also discrepancies in that evidence as to the number of *pahlwans* who received rewards from the father of the minors, and further there is nothing to show that the money which was borrowed from Sheo Golam was appropriated, as alleged by the witnesses even if we believe them, for the purpose of making presents to these *pahlwans*. Therefore, in Regular Appeals Nos. 232 and 267, we reverse the decision of the Subordinate Judge, and decree these appeals with costs of both Courts payable by the respondent.

We now come to Special Appeal No. 1630 of 1874. In that case the plaintiff is the mother and guardian of the minor son of one Gour Pershad Singh. Her suit was also on behalf of the minor to set aside a bond contracted by Gour Pershad, and to set aside a decree obtained on that bond and a sale in execution of that decree. The first Court, the Subordinate Judge of Sarun, modified the plaintiff's claim, and decreed the plaintiff's possession, although he was of opinion that the suit of the plaintiff was barred under the Statute of Limitation. On appeal to the Judge, the Judge has decided the case simply upon the issue of limitation. The Judge held that the suit ought to have been brought within one year from the date of the sale, and therefore that it was barred by limitation. As already stated, this special appeal was postponed at the request of the pleader for the appellant, the plaintiff in the case, until the two regular appeals just disposed of should be heard. Now it is contended by Moonshee Mahomed Yusuf, who appears for the plaintiff, that the suit is not barred by the Statute of Limitation, inasmuch as the suit is not for reversal of the sale alone, but for declaration of title and recovery of possession by setting aside the decree and the bond upon which it was based.

We think that this contention is good, and, if there were any evidence in this case that the debt which was contracted by Gour Pershad was for immoral purposes, we should have been obliged to remand the case, but the Moonshee, on being asked to point out any evidence on the record, or to say whether he was prepared to adduce any evidence to show that this debt was contracte immoral purposes, intimated to u inability to do so. We therefore th unnecessary to remand this case to ha issue tried whether the loan was cont by Gour Pershad for immoral purpo not; and we are further under the impre which has not been removed by the a ment of Moonshee Mahomed Yusuf, his object in asking the Court to pos this case until the hearing of the re appeals was, if successful in those app to ask the Court to allow this special a to follow the decision in the regular app

We, therefore, dismiss the special a with costs.

The 22nd February 1876.

Present:

The Hon'ble F. B. Kemp and C. Pont *Judges.*

Joint Undivided Tenure—Default of Co-s —Protection by Registry—Costs.

Case No. 258 of 1874.

Regular Appeal from a decision passed the Subordinate Judge of Shahabad, d the 26th of June 1874.

Lallah Rameshur Doyal Singh (Plaintif *Appellant,*

versus

Lallah Bishen Doyal Singh and anothe (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Taruck Dutt* for Appellant.

Mr. H. E. Mendies, Baboos Rash Beh Ghose, Tarucknath Palit, and *Ka Kant Sen* for Respondents.

In a suit brought by a co-sharer in a joint undiv tenure for damages from the other co-sharers on acc of default of payment of revenue by them, whereby share in the joint tenure was sold with the remai for arrears of revenue, the High Court, in re-affir the principle of a former decision (Vol. VII., W. pp. 72 and 73), wherein it was held that a suit w not lie between joint owners in an undivided estate damages sustained by the whole estate in conseque of default by one or more proprietors, now further fo that it was open to plaintiff under the sale-law to h protected his share by registry and by payment the arrear of revenue, and HELD that the defenda were entitled to their costs.

Kemp, J.—THE plaintiff is the appellan The suit was for damages amounting to R 10,478. The plaintiff alleges that he wa the proprietor of a 4-anna share in a mokur

ree right in certain mouzahs appertaining to lot Mehal Hakimpore, Pergunnah Chowassa, Zillah Shahabad. He alleges that the parent estate, Hakimpore, was sold for arrears of Government revenue owing to the neglect of his co-sharers in the mokurruree in paying up their quota of Government revenue. He further alleges that the entire 16 annas of the mouzah, which comprise the mokurruree, were let out in perpetual mokurruree by the Rajah of Buxar to Lallah Mewa Lal, the common ancestor of the parties to this suit, at a fixed annual jumma of Rs. 401; that, after the death of the ancestor, both parties to this suit in right of inheritance were in possession of the mokurruree, and that the practice amongst the co-sharers was to pay their respective quotas of Government revenue to the Collector direct, under an agreement with the superior landlord to that effect; that, under this alleged arrangement between the co-sharers, the plaintiff had to pay a 4-anna share of the Government revenue, the defendant No. 1 a 4-anna share, and the defendant No. 2 an 8-anna share; that, on the 28th of March 1872, being the last safe day for the payment of Government revenue, the plaintiff paid in his quota, but the defendants having neglected to pay in their respective shares of the Government revenue, the parent estate, Mehal Hakimpore, was sold at auction for arrears of revenue, and the price paid was Rs. 50,000; that the whole of the surplus sale-proceeds, after deducting the Government revenue due up to the 28th of March 1872, has been taken out of Court by the superior malik, the zemindar.

The plaint also refers to the fact of Lallah Bishen Doyal Singh, the defendant No. 1, having purchased the 8-anna share in the mokurruree from the defendant No. 2. The plaintiff, therefore, considers himself entitled by the acts of the defendants to recover damages from them, and he values his suit, and assesses his damages at the proper selling price of his 4-anna share in the mokurruree as prevalent in the pergunnah in which the mokurruree is situated.

The defendant No. 1, Bishen Doyal Singh, states that the plaintiff has not filed either the original or a copy of the mokurruree deed; that he has not been able to establish that there was such an arrangement as between the co-proprietors of the mokurruree to pay their respective quotas of the Government revenue according to their respective shares to the Collector; that, if the plaintiff is entitled to damages at all, he is entitled to them from the sale-proceeds; that the 8-anna share of Hurryhur Surun Singh, the defendant No. 2, was let out in *zur-i-peshgee ticca* to Lallah Hurruck Narain Singh, from 1273 to 1279 Fuslee; that, under the terms of the *zur-i-peshgee* pottah, the zur-i-peshgeedar, Hurruck Narain Singh, was bound to pay the Government revenue in proportion to the 8-anna share leased to him; that the zur-i-peshgeedar, with the view to injure the rights of the defendant No. 1, and in collusion with the plaintiff, withheld payment of his quota of the Government revenue; that the defendant No. 1's mookhtear, on ascertainment that the Government revenue had not been paid in, on the 29th of March 1872, petitioned the Collector to receive the revenue then due, but that the Collector refused to receive the money, and rejected the petition; that the plaintiff has also obtained a deed of conveyance, dated the 28th December 1871, from the aforesaid Hurryhur Surun Singh, defendant No. 2, in favour of himself, the plaintiff, and Lallah Hurruck Narain Singh, the aforesaid zur-i-peshgeedar; and that litigation has been going on with reference to this purchase. The Subordinate Judge has dismissed the plaintiff's case for reasons which it is unnecessary for us to enter into, as we do not adopt those reasons. On the case coming on before us on appeal, the pleader for the respondent took an objection to the suit, and referred to a decision to be found in Vol. VII., Weekly Reporter, pages 72 and 73, which followed a former decision of the Sudder Court of 1857. In the suit alluded to in Vol. VII., Weekly Reporter, Justices Norman and Seton-Karr held that a suit would not lie between joint owners in undivided estates for damages sustained by the whole estate in consequence of the default of one or more of the co-proprietors in paying their shares of the Government revenue. As already observed, this case followed a decision of the Sudder Court of 1857, page 1244, in the case of Gunga Pershad Sahee *vs.* Madho Pershad Sahee. We think that the rule laid down in those decisions is a proper one, and further we find that, under the provisions of Act XI. of 1859, section 40, the plaintiff could have protected his interests by having his mokurruree right registered. He also, under the said Act, could have paid in the Government revenue due on account of the shares of his co-proprietors in the mokurruree, and thus saved the estate from sale. We find, on turning to the kyfeut of the Collectorate Amlah, which was called for by the Collector

at the time when Bishen Doyal Singh, the defendant No. 1, petitioned to be allowed to save the property from sale by paying the revenue due on the 28th March 1872, that the balance then due was a very small one, under Rs. 100. There was, therefore, no difficulty whatever in the plaintiff avoiding the sale by paying the sum then due on account of Government revenue. Following, therefore, the ruling in Vol. VII., Weekly Reporter, and that of the Sudder Dewanny Adawlut of 1857 alluded to above, we dismiss the plaintiff's suit.

Then there is a further question for consideration, namely, whether the defendants are not entitled to their costs in this suit. A cross-appeal has been made to this Court on that point, and we think that the defendants ought to get their separate costs in this litigation.

We dismiss the appeal of the plaintiff with costs, and modify the decree of the Court below to this extent that we decree costs to each of the two defendants in this case.

The 23rd February 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Registry by Putneedar.

Case No. 2074 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 10th June 1874, reversing a decision of the First Subordinate Judge of that District, dated the 31st January 1874.

Gossain Mungul Doss (Plaintiff), *Appellant*,

versus

Baboo Roy Dhunput Singh Bahadoor (Defendant), *Respondent*.

Mr. G. Gregory for Appellant.

Mr. R. T. Allan for Respondent.

A putnee talook having been purchased at a sale for arrears was subsequently, by private sale, transferred to plaintiff, who, however, omitted to get his name registered as putneedar; whereupon the zemindar sold up the putnee a second time, and bought it in himself. Plaintiff now sues to have this sale set aside: HELD that, as plaintiff omitted to have his name registered, he is not in a position to sue to set aside the sale.

Garth, C.J.—THE facts found by the Judge in this case are, that Tofa Lall was the purchaser at the sale that took place in 1278. He, by private sale, transferred the putnee to the plaintiff. The plaintiff no steps to get his name registered, a zemindar caused the putnee to be agai in 1279, and himself became the purc It is this sale which the plaintiff see set aside. The Judge has held that, the plaintiff can sue to set aside the sal must show that he was the regis putneedar, or had taken steps to g name registered, and had been refused try. We think that the Judge has right construction upon the law. zemindar was not bound to recogni private transfer by an unregistered chaser (Tofa Lall) to the plaintiff.

The Judge finds as a fact that the pl was never accepted by the zemind assignee of the putnee, and that the p iff had never attempted to pay the fe get his name registered. In fact the p iff's case, as put before us, is, that h not bound to pay the fees for registr as he was a purchaser at a sale for a of rent due to the zemindar. Both lower Courts found that Tofa Lall wa real purchaser at the sale for arrears of and the plaintiff has to fall back upo private purchase from Tofa Lall. Unt plaintiff fulfilled the requirements of law, the zemindar was not bound to re nize him as his tenant, and the plaint not in a position to sue to set aside the

The appeal will be dismissed with co

The 25th February 1876.

Present:

The Hon'ble F. A. Glover, *Judge*.

Appeal—Evidence not on Solemn Affirmati Code of Civil Procedure, s. 327—Arbitra award.

Case No. 1176 of 1875.

Special Appeal from a decision passed the Judge of Sarun, dated the 8th M 1875, reversing a decision of the M siff of that District, dated the 6th Fe ary 1874.

Lalla Mowa Lall (Plaintiff), *Appellant*,

versus

Sree Mahato (Defendant), *Respondent*.

Baboo Doorga Doss Dutt for Appella

Baboo Abinash Chunder Banerjee for Respondent.

A Moonsiff having decreed a suit to re-open a pa way, the Judge in appeal reversed the decision af

ersonal inquiry and upon evidence not taken on solemn firmation?

HELD that the Lower Appellate Court's decision was gally worthless.

Where an arbitration-award requires an application nder Act VIII. of 1859, s. 327, and such application is ot made, it must be proved in the usual way.

THIS was a suit to re-open a pathway and remove certain obstructions on land which e defendant claims as his.

The Moonsiff gave the plaintiff a decree n the ground that he had proved the exerse of his right of passage over this land r many years, whilst the defendant's plea of wnership in consequence of an arbitrationward had not been established.

The Judge reversed this decision. He ent to the spot himself, and, finding no trace either drainage or passage, whilst on the her hand there were the remains of an old nd wall between the plaintiff's and defendt's land, considered that there never had en any right of way as alleged. The dge questioned certain persons on the spot— e gomashta, an old inhabitant named nonee Lall, and others who are not named and was satisfied that the land in dispute d been in the defendant's possession for nerations.

I dare say that this decision was substanlly correct, but it was undoubtedly come in a manner that cannot be called legal. e Moonsiff took the evidence on solemn irmation of witnesses, and on that evidence me to a conclusion adverse to the defendant. e Judge ignored that evidence, and yet d not take any of his own, but decided the int in dispute on the information given to m by persons whom he found on the spot. is information may have been trustworthy, t it was not evidence, not having been en on solemn affirmation, and was there- e legally worthless as against that already corded by the Moonsiff.

The Judge did not go into the question, ether the arbitration-award, on which, must be remembered, the defendant ed his title to the disputed land, was oved, although there were, as it seems to , very good reasons for doing so. This bitration is said to have been come to er the plaintiff's suit was instituted, and linarily an application would have had to made to the Court for the appointment of bitrators. Assuming, however, that, nothstanding the institution of the suit, the rties could make their own arrangements a settlement without first withdrawing the e from the file of the Court, they would, hey wished to derive any benefit from the award, have had, under section 327 of the Code of Civil Procedure, to apply to have such award filed in Court; and if this were not done, the person relying upon the award, as the defendant does in this case, would have been obliged to prove it in the usual way, and this does not appear to have been done here.

I think that the appeal must be reheard by the Judge, and a fresh decision passed with reference to the above remarks. The plaintiff will get his costs of this appeal, and the general costs in the cause will follow the result of the Judge's decision.

The 25th February 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Act VIII. (B. C.) of 1869, s. 102—Rent-suit—Special Appeal.

Case No. 945 of 1875.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 31st December 1874, reversing a decision of the Moonsiff of Mozufferpore, dated the 12th January 1874.

Bhugwan Dutt Misser (Plaintiff), *Appellant,*

versus

Nowneedh Lall and another (Defendants), *Respondents.*

Baboo Joy Gobind Shome for Appellant.

Baboo Kalee Kishen Sen for Respondents.

In a suit for rent under Rs. 50, in which no question to enhance or vary the rate was decided, and in which,

although the first Court went into the question of title, the Lower Appellate Court came to no decision on the point, HELD that the case fell within the purview of Act VIII. (B. C.) of 1869, s. 102, and no special appeal lay.

THIS was a suit for arrears of rent. The Additional Judge, on appeal, has reversed the Moonsiff's order which decreed in favour of the plaintiff.

It has been objected by the respondent that, as this is a suit for rent under Rs. 50, in which no question of title to land or right to enhance or vary rent has been decided, this special appeal will not lie. It appears to me that this objection must prevail. It is contended, on the other side, that, inasmuch as the Moonsiff went into the question of title, the matter is taken out of the purview of section 102 of Act VIII. of 1869. But, whatever the Moonsiff may have done, there can be no doubt that the Additional Judge came to no decision on the point. He expressly says that his decision will not debar the plaintiff from bringing a suit hereafter to prove his title, and he dismisses the plaintiff's suit, because the relationship of landlord and tenant has not been shown to exist between the parties. There is no possible reason why the Additional Judge should have gone further than this. The plaintiff may possibly be the proprietor of the land, and, as such, he may have a right to receive the rent of every beegha of land within his estate. But for all that, if it is denied that there is any relationship of landlord and tenant between him and the defendant, it is clear that he could not succeed in the present suit. The case clearly comes within the provisions of section 102, and therefore no special appeal lies.

With reference to the case quoted by the appellant's pleader from the 23rd Weekly Reporter, page 11, where Mr. Justice Phear had given an opinion in support of the contention of the special appellant, I may mention that the judgment in that case was reversed on the 12th February 1875 by the decision of the Appeal Court, reported at page 268 of the same volume.

The special appeal is dismissed with costs.

The 28th February 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Evidence—Recusant Witnesses.

Case No. 1239 of 1875.

Special Appeal from a decision passed the First Subordinate Judge of Pa dated the 25th March 1875, reversing decision of the Moonsiff of Behar, d the 15th June 1874.

Luchmun Singh and another (Plaintiffs), *Appellants,*

versus

Chokowree Singh and others (Defendants) *Respondents.*

Moonshee Serajul Islam for Appellants.

Baboo Doorga Dass Dutt for Respondents.

Where a plaintiff does not exhaust all the means wh the law gives him for the production of evidence, b goes to trial upon the evidence which he has succeed in getting, the Court commits no error in law in dec ing the case upon the evidence before it.

Primâ facie this seems a hard case. B there is no ground that I can discover which this special appeal can be admitte The Subordinate Judge disbelieved the wi nesses who had been brought to prove th plaintiff's title to the land in dispute, an held that the defendant being in possessio it was for the plaintiff distinctly to prove h right, and that that ought to have been do by the production of the village papers an of the patwaree and other village authoriti who could have deposed to their correctne The special appellant says that he did a that he could to produce this evidence whic the Subordinate Judge thought necessar and that the Moonsiff, seeing that he ha done so, decided in his favour on the evidenc that was produced. If it were so that th special appellant had done all that the law prescribed for the production of his witnesse and documentary evidence, there might have been something to be said. But he did not. He contented himself by asking for a proclamation to be issued under section 159 of the Code of Civil Procedure. He did not, when the day fixed in the proclamation had expired without the appearance of the witnesses, make the application necessary under

penultimate clause of that section for the chment of the property of the defaulting esses, but went to trial upon the evi-ce which he had succeeded in getting. not see, therefore, how I can say that the ordinate Judge is wrong in deciding the as he did, nor can I remand it for fur-inquiry by him. It was for the special ellant to produce his evidence, or at all ats to exhaust all the means that the law him for its production. Not having e that, I cannot say that the Subordinate ge has committed an error in law in iding the case upon the evidence before .

The special appeal is dismissed, but, under circumstances, without costs.

The 29th February 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

it for Possession—Right of Occupancy—Continuous Tenancy under different Pottahs—Solehnama.

Case No. 1718 of 1875.

ecial Appeal from a decision passed by the Judge of Sarun, dated the 29th June 1875, reversing a decision of the Moonsiff of Chuprah, dated the 14th May 1874.

Narain Singh and others (Defendants), *Appellants,*

versus

Munsur Raoot (Plaintiff), *Respondent.*

Baboo Doorga Doss Dutt for Appellants.

Moonshee Abdool Baree for Respondent.

In a suit for possession, although a succession of pottahs, each for shorter periods than twelve years, but altogether carrying a tenure beyond an aggregate term of twelve years, clearly gives a tenant a right of occupancy, yet any *solehnama* filed in the case, and purporting to waive any right acquired by the tenant, must be considered in connection with his claim.

It appears to me that the Judge has come to a wrong decision in this case.

The plaintiff sued to recover possession of land which he said he had taken under a pottah from the zemindar for the year 1280. He was opposed by the defendants, who claim a *ryotee* right in the same land. The Judge has found the plaintiff's pottah proved. He has likewise found that the defendants' pottah, which he says extends down to 1280, does not give them a right of occupancy, but that its wording shows distinctly that that right is barred. With regard to the defendants' title, the Judge has omitted to take into consideration the pottah from 1280 to 1285, which has been found by the Moonsiff to be genuine, and to have been given to the defendants by the zemindar. Now, as the plaintiff claimed under a pottah dated 1280, it is manifest that it was necessary for the Judge to find whether the Moonsiff was right in his decision on this point, for, if he also thought the defendants' pottah genuine, the plaintiff's suit must have been dismissed at once, he having no possible right to dispossess the defendants when there were still five years of their lease to run.

Then, with regard to the pottahs themselves, the Judge has held that by their wording they expressly bar the defendants' right of occupancy, because the stipulation in them is, that the lessee shall pay rent for the term mentioned in the pottah, and which he considers to mean the same as shall retain possession only for that term, and that, therefore, the defendants have no claim to a right of occupancy, even supposing they held under a series of pottahs for more than twelve years. It has, however, been decided by a Full Bench of this Court, on the 22nd of September 1871, in the case of Sheo Perkash Misser *versus* Ram Sahai Singh (17 Weekly Reporter, page 62), that a ryot who has held or cultivated a piece of land continuously for more than twelve years, but, under several original leases or pottahs, is entitled to claim a right of occupancy in that land, notwithstanding that those leases or pottahs are for a specific term of years. The Judge's construction of the defendants' pottah, therefore, is not a correct one.

Then there is the solehnama by which it is stated that the defendants gave up their claim in 1275; and it is said that, by the action of that solehnama, every fresh lease which the defendants got put an end to the tenancy which they had acquired under the previous lease, and that the defendants' right of occupancy would date from the day the solehnama was executed. This solehnama has not been considered by the Judge. In fact he makes no mention of it. It will, however, have to be considered with reference to the question whether the defendants have or have not been in possession from 1262 to 1285, and whether such possession has given them a right of occupancy or not. I think the case must go back to the Judge in order that these questions may be decided.

If he finds in favour of the defendants on the question as to the right of occupancy, the plaintiff can raise no objection except such as the law allows. If, however, the question is found against the defendants, the Judge will have to consider their right under the pottah set up by them, for it is quite clear that, if that pottah is genuine, they cannot be ejected until its term expires.

The judgment of the Lower Appellate Court is reversed, and the case is remanded for re-trial with reference to the above remarks.

The 1st March 1876.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Decree-holder—Judgment-debtor—Execution of Decree—Omission of name in Execution.

Case No. 132 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 27th February 1875, reversing an order of the Moonsiff of Sarun, dated the 12th May 1874.

Baboo Mokoot Nath Pershad *alias* Foolyana Baboo (Judgment-debtor), *Appellant,*

versus

Gujadhur Pershad and another (Decree-holders), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Baboos Chunder Madhub Ghose and *Aubinash Chunder Banerjee* for Respondents.

The mere fact of a decree-holder having omitted to certify the names of some judgment-debtors on any former occasion on which he took out execution does not do away with the effect of the original decree against them.

Kemp, J.—We think this appeal must be dismissed with costs. The High Court, with the consent of the parties in the appeal before them, held that "after satisfaction of the first zur-i-peshgee of the respondent, decree-holder, the second zur-i-peshgee would remain in force and operation with respect to what the state of things would allow at the time after satisfaction of the first zur-i-peshgee." Then, with reference to the question of wassilat, the decree of the Sudder Ameen of December 1860, which is now being executed, clearly awarded wassilat against the defendants in that suit from [illegible] to the time of recovery of possession [illegible] all costs as against the defendants in [illegible] case. The mere fact of the decree-h[illegible] having omitted to certify the names of [illegible] judgment-debtors, appellants, on the [illegible] former occasions on which he took out ex[illegible]tion, does not do away with the effect of [illegible] original decree, which is now being execu[illegible] The last application made to execute [illegible] decree is in time, and it includes the na[illegible] of the appellants before us as the judgm[illegible] debtors against whom execution is so[illegible] Pleader's fees, two gold mohurs.

The 6th March 1876.

Present:

The Hon'ble E. G. Birch and Romesh Chunder Mitter, *Judges.*

Sale of Tenure—Moveable Property—Sale aside.

Case No. 421 of 1875.

Special Appeal from a decision passed by [illegible] Judge of West Burdwan, dated the [illegible] November 1874, reversing a decision of [illegible] Moonsiff of Bancoorah, dated the [illegible] December 1873.

Bama Soonduree Dossee (Defendant), *Appellant,*

versus

Mudhoo Soodun Biswas and others (Plaintiffs), *Respondents.*

Baboo Anund Chunder Ghosal for Appella[illegible]

Baboo Rash Beharee Ghose for Respondents.

It being against the provisions of the law to sell up [illegible] tenure of a judgment-debtor before selling up [illegible] moveable property, HELD that the judgment-debt[illegible] omission to oppose the illegal sale of his tenure at [illegible] time of the occurrence of the sale does not kill his ri[illegible] to move for the setting aside of the sale afterwards.

Birch, J.—We think that the Judge[illegible] decision is right. There is nothing [illegible] section 11, Act XXIII. of 1861, to preve[illegible] the plaintiff from bringing this suit. [illegible] execution of a decree for arrears of re[illegible] against the plaintiff, his tenure was attach[illegible] in contravention of the provisions of secti[illegible] 64 of the Rent Law, which prohibit an ord[illegible] for the sale of an under-tenure until [illegible] judgment-creditor shall have caused [illegible] moveable property of the judgment-debtor [illegible] be seized and sold in execution of the decre[illegible] The tenure was brought to sale and purchas[illegible]

the judgment-creditor. The plaintiff gs this suit to recover possession of the s thus sold, by establishing his right to and by reversal of the sale. The ge has held that the action of the Court execution was *ab initio* void, and that the ntiff is "at liberty to impeach the action he Court in a regular suit as contrary to ." And upon the merits he has decreed plaintiff's claim.

t is contended here that the plaintiff ld and ought to have raised objection at time of the attachment of the property l prior to its sale, and that, having omitted raise the objections when the proceedings execution were being taken, he cannot ng a suit to set aside the sale. We think t there is no force in this contention. If proceedings taken by the Court of execun were not in accordance with the law, re is nothing to prevent the party injured the action of the Court from suing to set m aside. Then it is said that, if the sale set aside, the defendant is left without edy. If this be so, the defendant has ly himself to blame. The law prescribes a rse for him to follow; he took proceedings contravention of the provisions of the law, d those proceedings have, by the decision the Judge, been declared null and void. The special appeal is dismissed with costs.

The 17th December 1875.

Present:

r James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

ossession — Boundary — Previous Decision of Civil Court.

*n Appeal from the High Court of Judicature at Fort William in Bengal.**

The Court of Wards

versus

Raja Leelanund Sing.

In this suit, which is essentially one of boundary, hich has formed the subject of litigation for many ars, and on which an order had previously been made Her Majesty in Council, HELD that the first question to be now determined was what was decided by he judgment of the Judicial Committee of the Privy Council on the former appeal, and what was the order f Her Majesty in Council thereon; and that neither ny Court in India, nor the Judicial Committee itself, could go behind the above-mentioned decision and order. HELD also, accordingly, that so much of the judgment of the Calcutta High Court as re-opened what had previously been decided on fresh evidence must be set aside; but that the evidence that had thus been brought to bear upon the case was entitled to consideration in so far as it bore upon those portions of the suit in respect of which the former decision of the Judicial Committee was not conclusive.

THIS appeal and cross-appeal are the close of a litigation in which the parties, or those whom they represent, have been engaged for more than twenty years concerning the ownership of a large tract of land lying between lands admitted to form part of their respective zemindaries, and consisting, for the most part, of hills and forests.

The dispute is essentially one of boundary. The facts out of which it arose, and the earlier history of the litigation which has been the consequence of it, are very fully stated in the report of the case on the former appeal to Her Majesty in Council, to be found in the 10th volume of Mr. Moore's Indian Appeals. And their Lordships, to avoid an unnecessary recapitulation, will, whenever it is requisite to do so, refer to that statement as if it were incorporated in the present judgment.

The first, and not the least, material question to be now determined is what was decided by the judgment of the Judicial Committee on that former appeal, and the order of Her Majesty in Council made thereon; and what issues were left open for the determination of the Indian Courts under that order, so far as it was one of remand.

The appeal was that of Raja Leelanund Sing, the plaintiff in the suit. By his plaint he had parcelled out the disputed land in definite areas, treating them as appurtenant to different mouzahs which had been recorded as forming part of the Nizamut or settled mehals, and claimed to recover them as lying within the boundaries of those mouzahs. He had never, as is now admitted, been in possession of any part of the land which is now in question. He adduced a considerable body of evidence in support of the case made by his plaint. The Judge of first instance, however, held that he had entirely failed to make out that case, or to establish a title to disturb the possession of the defendant, and dismissed the suit. On appeal, two of the Judges of the then Sudder Court affirmed that decree of dismissal. They, too, were clear that the plaintiff had failed to prove his title as alleged. On the other hand they seem to have admitted that the defendant could have no title to anything that was

* From the judgment of Norman and E. Jackson, JJ., dated the 2nd March 1870.

not included in the settlement of Havelee. They considered, however, that that settlement did include something in excess of the lands comprised in Captain Ellis's map, and within the disputed territory; that the extent of such excess was undetermined; and that it lay on the plaintiff to show what he was entitled to recover, which he had failed to do. The third and dissentient Judge, Mr. Sconce, would have given a decree in favour of the plaintiff. But his *ratio decidendi* was not so much that the plaintiff had proved his case as alleged (though he seems to have thought that some of the specified mouzahs had been shown to have lain, if not still to exist, wholly or partially in the disputed territory), as that the plaintiff, as purchaser of the Nizamut Mehals, was presumably entitled to all that was not included in the settlement of the resumed Pergunnah Havelee; and that no part of the disputed territory, nothing, in fact, beyond the confines of Ellis's map, had been included in that settlement. The Committee that determined the former appeal in 1864 clearly affirmed the findings of the two Indian Courts as to the insufficiency of the plaintiff's evidence to establish the case made by him. The judgment at page 111 of Mr. Moore's report says distinctly:—

"We agree indeed with the majority of "the Indian Judges that the appellant has "failed to prove that no part of the disputed "territory was included in the settlement, and "that he has failed to prove, by independent "evidence, his right to recover the mouzahs "as specified in the plaint."

It is important to remark upon the concurrent judgments of the two Indian Courts, and of the Committee of 1864, on this particular point; because the judgment of Mr. Justice Norman, which is now under appeal, whilst it admits (p. 644) that the new evidence taken on the remand did not carry the plaintiff's original case any further, proceeds almost entirely on the effect of the old evidence, and thus seems to re-open a question concluded by the former judgments.

If there is one thing more clearly expressed than another in the judgment of the Committee of 1864, it is that "the decision "of the suit depended on the question whe-"ther the land claimed, or any, and, if any, "what defined part of it, was included in the "Havelee settlement" (10 Moore, pp. 87, 88).

Upon this question the Committee had to pronounce between the joint judgment of the two Judges of the Sudder Court and the conflicting judgment of Mr. Sconce. To end it addressed itself to a careful exam tion of the settlement-proceedings, p cularly those of Mr. Piron. In the cour that, it found that two mouzahs named, one Gormaha or Kormaha, the other Gh khore, which lay partially, if not wh within the disputed territory, had been visedly relinquished by the Revenue Au rities pending the resumption-proceedings, part of the Nizamut Mehals; and accordin that so much of the disputed land as appurtenant to these mouzahs belonged and ought to be adjudged to, the plain On the other hand, it came to the conclu that the final settlement of Havelee, u the head of "Bunkur and Boondee Me "besides the putwarrie's papers, whate "came to light by the depositions of far "and persons informed and by perusal "pottahs, &c., S. R. 1,116," did incl "the revenue arising from Ghauts Ma "Kurraillee, and other ghauts" (10 Mo I. A., p. 103). The Committee next p ceeded to consider "what was this prope "and whether the ownership of it implied "ownership of any land in excess of the m "sured area, and beyond the confines "Ellis's map."

Upon this point they appear to have sa fied themselves that the ghauts in questi or some of them, were geographically beyo the confines of Ellis's map, and within disputed territory; but to have felt una to come to a clear conclusion as to the nat and character of the Bunkur and Boond Mehals and of the revenue arising from ghauts, and upon the question whether rights included in the settlement involv the proprietorship in the soil of any, what, part of the lands in dispute. It cordingly, finally deciding some of the qu tions in the cause, but leaving others open further inquiry, recommended Her Maje to make the order under which the sub quent proceedings have taken place.

That order declared, *first*, that the plaint was entitled to Mouzahs Kormaha and Gh rakhore and the lands comprised therein a belonging thereto, and to all such other pa of any of the lands in question in the suit were not included in the settlement of H velee; *secondly*, that the settlement of Havel comprised only the measured area of 123,20 beeghas, and so much of any of the land dispute as, upon the inquiries after directed might appear to belong, or be properly attributable to, the Bunkur and Boondee Mehal in the pleadings mentioned, or to the ghauts,

of which the same in part consist; and that the rights of Havelee in respect of Bakum did not extend beyond a certain quantity of land there specified. It then directed an inquiry: "What was the nature and character "of the Bunkur and Boondee Mehals, and "of the ghauts comprised therein respec- "tively which were included in Piron's set- "tlement, and were therein estimated at "1,116 sicca rupees; and whether the same "or any and which of them included any "and what part of, or any and what right or "interest in, the land in question in the "suit. And it finally declared that so much "of the land in question as might, upon such "inquiry, appear to be comprised in the said "Bunkur and Boondee Mehals or Ghauts "belonged to Havelee, and that the plaintiff "was entitled to recover the residue of the "land in question."

It appears to their Lordships that the broad, if not the sole, issue which this order left to be determined between the parties was what portion of the land in dispute was comprised in Mr. Piron's settlement under the item already set forth. It has, however, been strenuously argued at the Bar that, even if the terms of Mr. Piron's settlement import that he included therein some part of the disputed land, it was open to the parties under this order of remand to show that such inclusion was unintentional or improper; in other words, to question the propriety of the settlement and its binding force upon the plaintiff. Their Lordships cannot so construe the order. That it was not the intention of the Committee of 1864 to leave any such questions open plainly, as their Lordships think, appears from several passages in the judgment. It is said at p. 89 of Mr. Moore's Report: "In consider- "ing what was included in Havelee, the Court "below could only deal, as we, upon this "appeal, must deal, with the Havelee settle- "ment as it stands. For the purposes of this "suit, that settlement must be considered as "valid and subsisting." Again, at p. 99: "We think, indeed, that the settlement of "1844 affords the only safe criterion for deter- "mining what belongs to Havelee, and what "to the Nizamut Mehals." And at p. 103 of the same report it is said: "It must be "taken, then, that Mr. Piron not only includ- "ed, but properly included, the revenue "arising from Ghauts Marug, &c., in his "settlement."

It is said that this conclusion of the Committee was, as a passage in the preceding page indicates, partially at least, founded on a misconception, arising from an error in printing the former record, to the effect that certain village-papers, which were, in fact, part of the defendant's evidence, had been put in by the plaintiff. The judgment, however, seems to their Lordships to treat these documents rather as corroborative of the conclusion to which the Committee had come than as the foundation on which it rested.

Again, that the Committee of 1864 may reasonably have determined to conclude the question of the propriety and binding nature of the settlement, appears from this consideration. The plaintiff, if entitled to impeach that settlement, could only do so by proving clearly that it covered lands included in the perpetual settlement of the Nizamut Mehals. He had failed to do this, because he had failed to establish his title to the lands in dispute. The Committee, however, said in respect of him: "You shall not be concluded "by your failure to prove the title alleged "against the defendant in possession. He "cannot be entitled to anything that is not "included in the settlement of Havelee; and "you shall have the benefit of the presump- "tion that what is not so included belongs to "the Nizamut Mehals." The rights of the parties being thus stated, the issue between them necessarily becomes: "What was in fact included in the settlement of Havelee." Their Lordships, however, do not rest upon expressions in the judgment of the Committee as conclusive. If there be any inconsistency between them and the terms of Her Majesty's order in Council, the latter, which is in the nature of a decree, ought to prevail. On the other hand, if that has concluded the question now under consideration, neither the Courts in India, nor their Lordships sitting here, can go behind it. And looking to the terms of the inquiry directed, which assumes that the Bunkur and Boondee Mehals and the Ghauts are included in Piron's settlement, and seeks only to ascertain their character and nature and what they covered; and also to the final declaration that so much of the land as should be found to be comprised in these mehals and ghauts belongs to Havelee, their Lordships are clearly of opinion that the question of the propriety of Piron's settlement and of Piron's intention in making that settlement are no longer open to the plaintiff in this suit; and that the only question between the parties is what that settlement, as it stands, included in fact. This view of their Lordships necessarily

disposes of a considerable portion of the argument addressed to them at the bar and of Mr. Justice Norman's judgment.

Under the order in Council, as construed by their Lordships, the task of the Indian Courts upon the remand was plainly limited. They had to ascertain, *first*, whether the Bunkur and Boondee Mehals and the ghauts included in Piron's settlement, or any and which of them lay beyond the confines of Ellis's map and within the disputed territory; *second*, whether the rights so settled involved the proprietorship of the lands over which they were exercised; and, if so, *third*, what portions of the disputed territory represent such lands, and are, therefore, to be taken to be included in the settlement. For the purposes of these inquiries, they were at liberty to direct such local investigations as they might consider desirable, and were bound to give due effect to what had been laid down by the Committee of 1864 concerning the general burthen of proof.

Unfortunately, however, the Indian Courts have not thus restricted their action; they have allowed the parties to enlarge the scope of the fresh litigation by re-opening questions that had been decided; and it now becomes necessary to consider more particularly how the case stands on their conflicting judgments.

The cause was first heard on the remand by Mr. Craster, the Officiating Judge of Zillah Bhaugulpore. In his judgment he states that the main questions for the consideration of the Court were, *first*, were the Bunkur and Boondee Mehals and Ghauts, which form the subject of the present suit, included in Mr. Piron's settlement of Pergunnah Havelee; and, *second*, what was the nature of those mehals, and did they include any, and (if any) what, portion of the lands now in dispute. The first issue does not precisely accord with the terms of the inquiry directed by the order in Council; but, if we are to understand the term "mehals and ghauts, which form the subject of the present suit," to import mehals and ghauts within the disputed territory, the inquiry was legitimate, because the order in Council had not conclusively determined the geographical positions of all the ghauts, of which the revenue made up the sum of S. Rs. 1,116 mentioned in Piron's settlement; and, in fact, as will be shown hereafter, some of those ghauts now turn out to be within the confines of Ellis's map.

Upon these issues, however, the plaintiff seems to have succeeded in re-opening re-arguing at great length upon the fo as well as upon the fresh evidence, original question of title. Mr. Cra opinion on this part of the case wa favour of the defendant. But with opinion, and the reasons on which it founded, their Lordships, for the rea above stated, have, on the present occas little concern. Mr. Craster next proceed to dispose of the contention before him Mr. Piron not only did not intend to incl "the mehals and ghauts in questio (meaning it must be assumed mehals ghauts in the disputed territory) in settlement, but was apparently not aware of their existence; certainly had knowledge of them as assets of Havelee.

On this point, again, he found in fav of the defendant that the ghauts mentio in the proceedings were included, and rig included, in the settlement of Havelee, that they were situated beyond the li of Ellis's map, and within the disp territory.

He then addressed himself to the inq as to the nature of the property, and w ther the ownership of it implied the own ship of any land in excess of the measu area and beyond the confines of Ellis's m And for the reasons stated at pp. 608 609 of the new record, he came to conclusion that the Bunkur and Boon Mehals, comprised in Piron's settleme included the full proprietary right interest in the lands from which the reven appertaining to those mehals was deriv that is to say, of the lands situated wit and about the ghauts comprised within th mehals. And applying this principle, held that, inasmuch as the positions of ghauts had been determined to be beyo the confines of Ellis's map, and within disputed territory, it followed that "t lands within and about them were those question in the suit."

A new element of confusion appears have been introduced into the cause whi it was before Mr. Craster by an understand ing or arrangement between counsel tha as to that portion of the disputed land whic is south of the Karmeg Hill, there shou then be no trial of title; the plaintif intending to rely on his right to recover as part of the village of Gormaha in th execution-proceedings to be taken in order to enforce that part of the order in Council which had adjudged to him that mouzah. Mr. Craster's decree dismissed the suit,

so far as it sought to recover any of the property claimed, except that portion of it to which the plaintiff had been declared by the order in Council to be entitled.

The cause then went on appeal to a Division Bench of the High Court, consisting of Mr. Justice Norman and Mr. Elphinstone Jackson. Those learned Judges arrived at different conclusions; but, according to the course of practice, the judgment of the senior Judge prevailed, and the result was the decree which is under appeal.

In his long and elaborate judgment, Mr. Justice Norman appears to their Lordships to treat the case sometimes as open to him upon all the original issues; and, at others, as partially concluded by the order in Council.

At page 631, line 34, he says: "And, *first*, "I think it must be assumed that, notwithstanding anything Piron might have done, "nothing can be said to have belonged to, or "to have been properly attributable to, the "Bunkur and Boondee Mehals settled with "Maharanee Wuhjoonissa, which can be "shown to have been comprised in the perpetual settlement of Pergunnah Purbutparah, "and to have been held or enjoyed as part of "such perpetually-settled estate down to the "time of the plaintiff's purchase.

"*Secondly*—That, when bunkur and boondee rights are to be enjoyed over lands "which would appear to have formed part of "the lakhiraj estate of Havelee, and not to "have been comprised within Pergunnah "Purbutparah, the settlement of bunkur "rights would show, or assume the existence, "in the person with whom the settlement was "made, of a title to possession of the soil "itself, subject only to such rights as the "Government may have had on the expiration of the settlement for twenty years, to "demand an increased jumma in respect of "the rights to the soil.

"*Thirdly*.—That, when the Bunkur and "Boondee Mehals, mentioned in Piron's settlement, are found to exist in tracts in which "there is nothing to show that the land was "not part of Pergunnah Purbutparah, according to the decree of Her Majesty in Council, "the property in the soil and the right to the "rents and profits of any portion of it, cultivated or to be cultivated, must be taken to "belong to the plaintiff as appertaining to "Pergunnah Purbutparah, and the bunkur "and boondee as effectually settled with "Havelee under Piron's settlement."

Having thus defined the *ratio decidendi* which he proposed to adopt, the learned Judge, after reviewing the whole of the evidence in the cause, and particularly that taken before the remand, came to the conclusion that the accounts and other documentary evidence produced by the defendant on the original hearing of the cause were false and fabricated (an opinion then for the first time expressed), and that, on the contrary, the evidence for the plaintiff was trustworthy, and established that, from the time of the Decennial Settlement down to the time of the resumption of Havelee, there was within Pergunnah Purbutparah a Bunkur Mehal called the Bunkur of Morekhut and Tetroun; that the owner of this mehal was entitled to, and either personally received, the profit, or leased out the right to take the jungle products over all the hill tracts lying to the east of the cultivated lands of Tuppeh Lodhweh; that the settlement of Purbutparah in 1790, amongst the assets of which the Bunkur Mehal was set down, included the right to the absolute property in the soil in the entirety of the hills in question; that the Government retained no right or interest in the land in question at the time of Piron's settlement; and that no right or interest in this portion of the land in dispute passed, or could be passed, to Maharanee Wuhjoonissa under that settlement.

He found, moreover, secondly, that as regarded the land to the north and east of the road through the Amjhur Ghaut, the plaintiff was clearly, and in any view of the case, entitled to a decree, because neither the Bunkur Mehal of the Amjhur Ghaut, nor the Boondee Mehal of Bhorekund Chuckabore, were included in Peer Khan's pottah, and consequently could not be taken to be included in Piron's settlement. These findings were confined to that portion of the disputed land which the plaintiff claimed as appurtenant to Tuppeh Lodhweh.

The learned Judge next proceeded to deal with the claim of the plaintiff to recover possession of Soogee, and the land to the north and west of the village marked by that name in Captain Sherwill's map. He held that the plaintiff's evidence had made out no title to recover this; that, on the contrary, the evidence that Soogee, as far as Ghaut Marug was really part of Havelee, was very strong; and, consequently, though unable to account for its not being included in Ellis's map, he awarded this portion of the land in dispute to the defendant.

He next proceeded to consider the defendant's title in respect of the ghauts

west of Soogee and south of Simroun, *viz.*, Gooreya, Shela Mela, Sikhole, and others. The portion of the land in dispute which belonged to, or is represented by, those ghauts, had been claimed by the plaintiff as appurtenant to Tuppeh Simroun.

He failed, however, in Mr. Justice Norman's judgment, to give any trustworthy evidence that the land ever formed part of Tuppeh Simroun, or that the farmers of that Tuppeh ever exercised any dominion over the land, or that the profits of the ghauts in question were ever included in the collections of Simroun. He produced no pottahs or kubooleuts relating to the bunkur of the ghauts, nor any accounts whatever of bunkur and boondee in respect of Simroun. On the other hand, the learned Judge thought that the defendant had failed to show affirmatively by trustworthy evidence that Ellis and Farquharson were wrong in excluding this tract from Havelee. He observed that, if he could have given full effect to his own impressions, he would have ruled that the inclusion of the Bunkur and Boondee Mehals in Piron's settlement was effected by means of fraud; but that giving effect to that part of the judgment of the Committee of 1864 which threw upon the plaintiff the burthen of proof, and taking the Bunkur, Boondee, and Phulkur Mehals to be included, and rightly included, in Piron's settlement, he thought that in the absence of any proof that the tract in question had been previously included in the settlement of Purbutparah, or that the owner of that Pergunnah had ever exercised any ownership over the land, he was bound to say that the Bunkur, Boondee, and Phulkur Mehals of the tract in question included all the profits derivable from the soil; and, if so, that the property of the soil was, at the date of the resumption, vested in the owner of Pergunnah Havelee as an integral part of that estate. The learned Judge added: "If the "plaintiff has any right to this portion of the "land, it appears to me that, under the "directions contained in the judgment of their "Lordships, I must say that he has failed to "prove it."

He then proceeded to deal with that portion of the disputed territory which lies south of the Karmeg Hill, otherwise called the Khurwa Dalan. The title to this, as has been already stated, was, by the arrangement before Mr. Craster, left to be determined in the execution-proceedings to be thereafter taken. The High Court, however, thought that the question should be determined on the appeal before them; and gave to Counsel for the defendant an opportun producing any evidence which, but fo arrangement in question, they would produced on this part of the case. Of opportunity they did not avail themse but relied on the failure of the plaintiff the general burthen of proof that lay on to show that this portion of the land was included in Posun Pasee's lease. The H Court, however, held that it was the du the defendant to produce Posun Pa lease; and that, in its absence, the immediately in question must be pronou not to be included in Piron's settleme and, therefore, under the terms of the o in Council, to belong to the plaintiff.

Mr. Justice Norman gave effect to findings by defining on a copy of Sher map, by the course of a stream and two lines, the boundaries of the land, which proposed to leave in the possession of defendant; and by awarding to the pla the rest of the land in dispute.

Mr. Justice Elphinstone Jackson, as already been stated, did not concur with colleague. He agreed that the land s of the Karmeg Hill ought to be adjud to the plaintiff; but, as to the land north that hill, he felt that the High Court bound by the order in Council, and Mr. Justice Norman's judgment was in sistent with that order. His own views thus expressed —

"It has been argued before us that "decision of the Privy Council leaves "whole question open as to whether any "tion of the disputed land is attributable "or is conveyed by, the settlement of "bunkur and boondee rights. If the pl "iff could show even now that the gh "or hills, the bunkur and boondee rights "which were settled with Havelee, were "ated in Havelee proper, as measured "Captain Ellis, I think he might still ob "a decree for the whole land in dispute. "there is no longer any attempt to do t "It is admitted, or, if not admitted, it "quite clear, that those bunkur rights exte "ed over a large portion of the disputed la "There is no doubt or mistake as to the po "tion of the ghauts in which those bunk "rights existed. If the bunkur rights "Hursa Totya, Baromussia, Kallythan, Mar "Kurrailee, &c, are rightly included wi "Havelee, they convey also the bunkur rig "of the whole tract of land situated betwe "them and Havelee. If the bunkur rights car "the land, then they carry with them the rig

ersonal inquiry and upon evidence not taken on solemn firmation :

HELD that the Lower Appellate Court's decision was gally worthless.

Where an arbitration-award requires an application ader Act VIII. of 1859, s. 327, and such application is ot made, it must be proved in the usual way.

THIS was a suit to re-open a pathway and remove certain obstructions on land which e defendant claims as his.

The Moonsiff gave the plaintiff a decree n the ground that he had proved the exerse of his right of passage over this land r many years, whilst the defendant's plea of wnership in consequence of an arbitrationward had not been established.

The Judge reversed this decision. He ent to the spot himself, and, finding no trace either drainage or passage, whilst on the her hand there were the remains of an old ud wall between the plaintiff's and defendt's land, considered that there never had en any right of way as alleged. The dge questioned certain persons on the spot— e gomashta, an old inhabitant named honee Lall, and others who are not named and was satisfied that the land in dispute d been in the defendant's possession for nerations.

I dare say that this decision was substanlly correct, but it was undoubtedly come in a manner that cannot be called legal. e Moonsiff took the evidence on solemn irmation of witnesses, and on that evidence me to a conclusion adverse to the defendant. e Judge ignored that evidence, and yet d not take any of his own, but decided the int in dispute on the information given to n by persons whom he found on the spot. is information may have been trustworthy, t it was not evidence, not having been en on solemn affirmation, and was there- e legally worthless as against that already corded by the Moonsiff.

The Judge did not go into the question, ether the arbitration-award, on which, must be remembered, the defendant sed his title to the disputed land, was oved, although there were, as it seems to , very good reasons for doing so. This bitration is said to have been come to er the plaintiff's suit was instituted, and dinarily an application would have had to made to the Court for the appointment of bitrators. Assuming, however, that, notbstanding the institution of the suit, the rties could make their own arrangements a settlement without first withdrawing the e from the file of the Court, they would, hey wished to derive any benefit from the award, have had, under section 327 of the Code of Civil Procedure, to apply to have such award filed in Court; and if this were not done, the person relying upon the award, as the defendant does in this case, would have been obliged to prove it in the usual way, and this does not appear to have been done here.

I think that the appeal must be reheard by the Judge, and a fresh decision passed with reference to the above remarks. The plaintiff will get his costs of this appeal, and the general costs in the cause will follow the result of the Judge's decision.

The 25th February 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Act VIII. (B. C.) of 1869, s. 102—Rent-suit—Special Appeal.

Case No. 945 of 1875.

Special Appeal from a decision passed by the Officiating Additional Judge of Tirhoot, dated the 31st December 1874, reversing a decision of the Moonsiff of Mozufferpore, dated the 12th January 1874.

Bhugwan Dutt Misser (Plaintiff), *Appellant,*

versus

Nowneedh Lall and another (Defendants), *Respondents.*

Baboo Joy Gobind Shome for Appellant.

Baboo Kalee Kishen Sen for Respondents.

In a suit for rent under Rs. 50, in which no question to enhance or vary the rate was decided, and in which,

that they see no ground for disturbing the decree under appeal.

The title of the defendant rests on the inclusion of the land immediately in question in the settlement of Piron. That settlement, so far as it related to the disputed territory, was founded generally on the depositions and pottahs of Peer Khan Soubadar, Durshun Singh, Posun Passee, and others. There is nothing to connect this southern portion of the disputed territory with the holding of Peer Khan.

The holding of Durshun Singh would now seem, from the further evidence which has been elicited on the remand, to have been wholly within the measured area of Ellis's map. This evidence appears to their Lordships to be fairly summed up by Mr. Elphinstone Jackson at p. 676 of the new record. In any case, there is nothing to show that Durshun Singh's pottah covered any of the disputed land south of the Karmeg Hills.

Again, neither Posun Passee's pottah nor his kubooleut is forthcoming; nor is there any evidence which satisfactorily connects the holding by him which was the subject of Mr. Piron's settlement with this southern portion of the disputed territory.

On the other hand, the order in Council has already affirmed the plaintiff's title to Gormaha, *i. e.*, to an indeterminate part of this tract of land. It has also limited the defendant's interest in mouzah Bakum to the small area lying within the confines of Ellis's map. In this state of the evidence, their Lordships are clearly of opinion that there is no proof that this southern portion of the disputed territory, or any part of it, was comprised within the Bunkur and Boondee Mehals or Ghauts settled as part of Havelee; and consequently, that, under the order in Council, the plaintiff is entitled to recover it, whether it is, in fact, wholly or only partially comprised in mouzah Gormaha.

As to the northern portion of the disputed territory, their Lordships have alre_dy intimated that, in their opinion, the proper *ratio decidendi* is that which Mr. Justice Elphinstone Jackson thought himself bound to adopt, and not that which was, in fact, adopted by Mr. Justice Norman.

Again the question what was included in the settlement seems to be almost identical with what at that date was held by Peer Khan Soubadar. Mr. Elphinstone Jackson held that, in the absence of evidence on the part of the plaintiff to show what parts of the disputed territory were not attributable to the ghauts about which they lay, the possession of the defendant must prevail; that, with the exception of the Amjhu which will be hereafter considered, the of the northern portion of the disputed tory must be taken to be included settlement, and to belong to Havelee.

Their Lordships are of opinion that view is correct. The ghauts schedule Peer Khan's pottah, from Hursa Po or Hursa Tooteea in the north, to S or Sehla in the south, are all traceab this tract of land. And, indeed, the clusion that, on the construction which Lordships have put on the order in Co all the land last mentioned must be to belong to Havelee, may be said common to all the Judges, since it is im in the second finding of Mr. Justice No at p. 658 of the new record. The only culty that arises concerning it is that is suggested on the cross-appeal in re of Soogee. And, oddly enough, that very portion of the land in dispute which all the Judges have found that defendant has a good title independe the settlement—a title which Mr. El stone Jackson says was hardly disputed Counsel for the plaintiff (p. 676). It be remarked, moreover, that this fact consistent with the plaintiff's theory that possession by the defendant of any beyond the measured area of Ellis's map an encroachment upon the Nizamut Meh and the result of a conspiracy between original defendant, the former owner of whole Khurruckpore zemindary, and is slight evidence of what was alleged to be original rights of Havelee.

The difficulty suggested is, however, th Soogee was not included in Peer Kh pottah of the ghauts. In his deposition be Mr. Piron (old record, p. 345, in writ he speaks of it as held by a separate po There is no clear proof that that po was afterwards produced before Mr. Pi or that what it covered was included in settlement. The rent received by that po does not appear to enter into the sum S. Rs. 1,116 mentioned in the settleme It is, therefore, urged that, under the s construction of the order in Council, Soo and its appurtenances not being included the settlement, must be adjudged to plaintiff.

On the other hand, it is argued that intention was obviously to include in settlement whatever was held by Peer Kh under lease from the proprietors of Havel that his second pottah is mentioned in

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position; that all the evidence shows that did so hold Soogee and its appurtenances; that the expression of Mr. Piron in the sage so often quoted from his report is atever was found by the depositions of er Khan and others, &c. Mr. Cowie has o contended, and his contention seems to borne out by the schedule to the original int, that the plaintiff has never claimed ogee as such. In these circumstances, ir Lordships think that they would not be rranted in giving the plaintiff a decree Soogee and its appurtenances against the fendant, who is shown to have had, from beginning of the suit, both the possession and title to, that village; and that it must treated as virtually included in the settlent.

The only remaining question is the right the land lying north and east of the road rough the Amjhur Ghaut. The Amjhur aut is not amongst those mentioned in the edule to Peer Khan's pottah. *Primâ cie*, therefore, it was not included in ron's settlement. The land about it has arly nothing to do with Soogee. The rned Counsel for the defendant referred ir Lordships to a kubooleut of Peer han at p. 193 of the new record, in ich Ghaut Amjhur is specified as leased him; but that document was not before r. Piron. It bears date the 15th of March, d was registered on the 18th of March 44; whereas the pottah, which was before r. Piron, appears to have been executed in nuary 1840 (25th Maug 1247 F.), and to ve been registered on the 13th of January 42. It is possible that, in the interval, ose interested in enlarging the borders of avelee, may have advanced further into the sputed territory. The defendant's Counsel ve also called in aid an old kubooleut of 11 F., at p. 462 W., and a pottah of 1228, p. 469 W. of the old record. But to say thing of the discredit thrown upon the fendant's documentary evidence by Mr. stice Norman, and, to some extent, by his lleague also, it is sufficient to remark that e same rule which their Lordships have, on other part of the case, applied to the plaintf, must also be applied to the defendant, d that these old documents, tendered to ove the original title of Havelee, have no earing on the question of what was, in fact, cluded in the settlement as held by Peer Khan. Reference has also been made to ertain proceedings of the revenue officers ubsequent to the settlement, particularly to Mr. Quintin's letter, at page 249, O. R., which, referring to a report of Mr. Piron, states that Amjhur Ghaut was included in the settlement. This letter, however, was written in 1849, when Peer Khan seems to have got into possession of Amjhur Ghaut; and what he then held may easily have been confounded, or assumed to be identical, with what he held under the pottah of 1840, which, in this very letter of Mr. Quintin's is treated as the basis of the settlement. Subsequent statements of the revenue officers, as to the effect of the settlement, cannot, in their Lordships' opinion, avail to supply the evidence which the settlement-proceeding itself, and the pottah on which it purports to be founded, fail to afford. A more important document is the proceeding of Mr. Piron of the 11th of May 1844, which was had before his signature of the final settlement-proceeding on the 20th of June 1844, though after the grant to Maharanee Wuhjoonissa of a lease of Havelee on the basis of the contemplated settlement on the 9th of April 1844. In that proceeding, which was at the instance of the Maharanee complaining of a disturbance by Resaz Ali of her possession of the ghaut included in the settlement, mention is made of Ghaut Amjhur as one of those ghauts. It is to be observed, however, that that mention is only in the abstract of her petition; and that it is possible that, when Mr. Piron reported to the Magistrate that all the ghauts so mentioned were settled with Havelee, his mind was not directed to Ghaut Amjhur in particular, or to the fact that it was not specified in Peer Khan's pottah. The proceeding is not properly part of the settlement-proceedings, nor an adjudication of right binding upon the plaintiff.

On the whole, then, though not without doubt, their Lordships have come to the conclusion that Ghaut Amjhur, with whatever land it covers, has not been shown to have been included in the settlement of Havelee, and that, under the terms of the order in Council, the plaintiff is entitled to recover the land north and east of the road passing through that ghaut.

The order, therefore, which their Lordships will humbly advise Her Majesty to make, is—

First.—To reverse the decree of the High Court, except so far as it reverses the decree of the lower Court; and, in lieu thereof, to declare and decree that, in addition to the villages of Gormaha and Ghorakhore, in the former order of Her Majesty mentioned, the plaintiff is entitled to recover and do recover so much of the land in dispute as

at the time when Bishen Doyal Singh, the defendant No. 1, petitioned to be allowed to save the property from sale by paying the revenue due on the 28th March 1872, that the balance then due was a very small one, under Rs. 100. There was, therefore, no difficulty whatever in the plaintiff avoiding the sale by paying the sum then due on account of Government revenue. Following, therefore, the ruling in Vol. VII., Weekly Reporter, and that of the Sudder Dewanny Adawlut of 1857 alluded to above, we dismiss the plaintiff's suit.

Then there is a further question for consideration, namely, whether the defendants are not entitled to their costs in this suit. A cross-appeal has been made to this Court on that point, and we think that the defendants ought to get their separate costs in this litigation.

We dismiss the appeal of the plaintiff with costs, and modify the decree of the Court below to this extent that we decree costs to each of the two defendants in this case.

The 23rd February 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Registry by Putneedar.

Case No. 2074 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 10th June 1874, reversing a decision of the First Subordinate Judge of that District, dated the 31st January 1874.

Gossain Mungul Doss (Plaintiff), *Appellant*,

versus

Baboo Roy Dhunput Singh Bahadoor (Defendant), *Respondent*.

Mr. G. Gregory for Appellant.

Mr. R. T. Allan for Respondent.

A putnee talook having been purchased at a sale for arrears was subsequently, by private sale, transferred to plaintiff, who, however, omitted to get his name registered as putneedar; whereupon the zemindar sold up the putnee a second time, and bought it in himself. Plaintiff now sues to have this sale set aside: HELD that, as plaintiff omitted to have his name registered, he is not in a position to sue to set aside the sale.

Garth, C.J.—THE facts found by the Judge in this case are, that Tofa Lall was the purchaser at the sale that took place in 1278. He, by private sale, transferred the putnee to the plaintiff. The plaint[illegible] no steps to get his name registered, a[illegible] zemindar caused the putnee to be ag[illegible] in 1279, and himself became the pur[illegible] It is this sale which the plaintiff se[illegible] set aside. The Judge has held that, [illegible] the plaintiff can sue to set aside the sa[illegible] must show that he was the regi[illegible] putneedar, or had taken steps to g[illegible] name registered, and had been refused [illegible] try. We think that the Judge has [illegible] right construction upon the law. [illegible] zemindar was not bound to recogni[illegible] private transfer by an unregistered [illegible] chaser (Tofa Lall) to the plaintiff.

The Judge finds as a fact that the p[illegible] was never accepted by the zemind[illegible] assignee of the putnee, and that the p[illegible] iff had never attempted to pay the f[illegible] get his name registered. In fact the p[illegible] iff's case, as put before us, is, that h[illegible] not bound to pay the fees for regist[illegible] as he was a purchaser at a sale for [illegible] of rent due to the zemindar. Both [illegible] lower Courts found that Tofa Lall wa[illegible] real purchaser at the sale for arrears of [illegible] and the plaintiff has to fall back upo[illegible] private purchase from Tofa Lall. Un[illegible] plaintiff fulfilled the requirements of [illegible] law, the zemindar was not bound to re[illegible] nize him as his tenant, and the plaint[illegible] not in a position to sue to set aside the [illegible]

The appeal will be dismissed with co[illegible]

The 25th February 1876.

Present:

The Hon'ble F. A. Glover, *Judge*.

Appeal—Evidence not on Solemn Affirmati[illegible] Code of Civil Procedure, s. 327—Arbitr[illegible] award.

Case No. 1176 of 1875.

Special Appeal from a decision passed [illegible] the Judge of Sarun, dated the 8th M[illegible] 1875, reversing a decision of the M[illegible] siff of that District, dated the 6th Ja[illegible] ary 1874.

Lalla Mowa Lall (Plaintiff), *Appellant*,

versus

Sree Mahato (Defendant), *Respondent*.

Baboo Doorga Doss Dutt for Appella[illegible]

Baboo Abinash Chunder Banerjee for Respondent.

A Moonsiff having decreed a suit to re-open a pa[illegible] way, the Judge in appeal reversed the decision af[illegible]

by the judgment-creditor. The plaintiff brings this suit to recover possession of the lands thus sold, by establishing his right thereto and by reversal of the sale. The Judge has held that the action of the Court of execution was *ab initio* void, and that the plaintiff is "at liberty to impeach the action of the Court in a regular suit as contrary to law." And upon the merits he has decreed the plaintiff's claim.

It is contended here that the plaintiff could and ought to have raised objection at the time of the attachment of the property and prior to its sale, and that, having omitted to raise the objections when the proceedings in execution were being taken, he cannot bring a suit to set aside the sale. We think that there is no force in this contention. If the proceedings taken by the Court of execution were not in accordance with the law, there is nothing to prevent the party injured by the action of the Court from suing to set them aside. Then it is said that, if the sale is set aside, the defendant is left without remedy. If this be so, the defendant has only himself to blame. The law prescribes a course for him to follow; he took proceedings in contravention of the provisions of the law, and those proceedings have, by the decision of the Judge, been declared null and void.

The special appeal is dismissed with costs.

The 17th December 1875.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Possession — Boundary — Previous Decision of Civil Court.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

The Court of Wards

versus

Raja Leelanund Sing.

In a suit, which is essentially one of boundary, which has formed the subject of litigation for many years, and on which an order had previously been made by Her Majesty in Council, HELD that the first question to be now determined was what was decided by the judgment of the Judicial Committee of the Privy Council on the former appeal, and what was the order of Her Majesty in Council thereon; and that neither any Court in India, nor the Judicial Committee itself, could go behind the above-mentioned decision and order. HELD also, accordingly, that so much of the judgment of the Calcutta High Court as re-opened what had previously been decided on fresh evidence must be set aside; but that the evidence that had thus been brought to bear upon the case was entitled to consideration in so far as it bore upon those portions of the suit in respect of which the former decision of the Judicial Committee was not conclusive.

THIS appeal and cross-appeal are the close of a litigation in which the parties, or those whom they represent, have been engaged for more than twenty years concerning the ownership of a large tract of land lying between lands admitted to form part of their respective zemindaries, and consisting, for the most part, of hills and forests.

The dispute is essentially one of boundary.

The facts out of which it arose, and the earlier history of the litigation which has been the consequence of it, are very fully stated in the report of the case on the former appeal to Her Majesty in Council, to be found in the 10th volume of Mr. Moore's Indian Appeals. And their Lordships, to avoid an unnecessary recapitulation, will, whenever it is requisite to do so, refer to that statement as if it were incorporated in the present judgment.

The first, and not the least, material question to be now determined is what was decided by the judgment of the Judicial Committee on that former appeal, and the order of Her Majesty in Council made thereon; and what issues were left open for the determination of the Indian Courts under that order, so far as it was one of remand.

The appeal was that of Raja Leelanund Sing, the plaintiff in the suit. By his plaint he had parcelled out the disputed land in definite areas, treating them as appurtenant to different mouzahs which had been recorded as forming part of the Nizamut or settled mehals, and claimed to recover them as lying within the boundaries of those mouzahs. He had never, as is now admitted, been in possession of any part of the land which is now in question. He adduced a considerable body of evidence in support of the case made by his plaint. The Judge of first instance, however, held that he had entirely failed to make out that case, or to establish a title to disturb the possession of the defendant, and dismissed the suit. On appeal, two of the Judges of the then Sudder Court affirmed that decree of dismissal. They, too, were clear that the plaintiff had failed to prove his title as alleged. On the other hand they seem to have admitted that the defendant could have no title to anything that was

* From the judgment of Norman and E. Jackson, JJ., dated the 2nd March 1870.

although the first Court went into the question of title, the Lower Appellate Court came to no decision on the point, HELD that the case fell within the purview of Act VIII. (B. C.) of 1869, s. 102, and no special appea lay.

THIS was a suit for arrears of rent. The Additional Judge, on appeal, has reversed the Moonsiff's order which decreed in favour of the plaintiff.

It has been objected by the respondent that, as this is a suit for rent under Rs. 50, in which no question of title to land or right to enhance or vary rent has been decided, this special appeal will not lie. It appears to me that this objection must prevail. It is contended, on the other side, that, inasmuch as the Moonsiff went into the question of title, the matter is taken out of the purview of section 102 of Act VIII. of 1869. But, whatever the Moonsiff may have done, there can be no doubt that the Additional Judge came to no decision on the point. He expressly says that his decision will not debar the plaintiff from bringing a suit hereafter to prove his title, and he dismisses the plaintiff's suit, because the relationship of landlord and tenant has not been shown to exist between the parties. There is no possible reason why the Additional Judge should have gone further than this. The plaintiff may possibly be the proprietor of the land, and, as such, he may have a right to receive the rent of every beegha of land within his estate. But for all that, if it is denied that there is any relationship of landlord and tenant between him and the defendant, it is clear that he could not succeed in the present suit. The case clearly comes within the provisions of section 102, and therefore no special appeal lies.

With reference to the case quoted by the appellant's pleader from the 23rd Weekly Reporter, page 11, where Mr. Justice Phear had given an opinion in support of the contention of the special appellant, I may mention that the judgment in that case was reversed on the 12th February 1875 by the decision of the Appeal Court, reported at page 268 of the same volume.

The special appeal is dismissed with costs.

The 28th February 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Evidence—Recusant Witnesses.

Case No. 1239 of 1875.

Special Appeal from a decision passed the First Subordinate Judge of Pa dated the 25th March 1875, reversin decision of the Moonsiff of Behar, d the 15th June 1874.

Luchmun Singh and another (Plaintiffs) *Appellants,*

versus

Chokowree Singh and others (Defendan *Respondents.*

Moonshee Serajul Islam for Appellants

Baboo Doorga Dass Dutt for Responde

Where a plaintiff does not exhaust all the means w the law gives him for the production of evidence, goes to trial upon the evidence which he has succe in getting, the Court commits no error in law in d ing the case upon the evidence before it.

Primâ facie this seems a hard case. there is no ground that I can discover which this special appeal can be admit The Subordinate Judge disbelieved the nesses who had been brought to prove plaintiff's title to the land in dispute, held that the defendant being in posses it was for the plaintiff distinctly to prove right, and that that ought to have been d by the production of the village papers of the patwaree and other village authori who could have deposed to their correctn The special appellant says that he did that he could to produce this evidence wh the Subordinate Judge thought necess and that the Moonsiff, seeing that he done so, decided in his favour on the evide that was produced. If it were so that special appellant had done all that the prescribed for the production of his witne and documentary evidence, there might h been something to be said. But he did He contented himself by asking for a p clamation to be issued under section 159 the Code of Civil Procedure. He did when the day fixed in the proclamation expired without the appearance of the nesses, make the application necessary un

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plaintiff's title to certain property which he had purchased at auction so far back as 1864; and, *secondly*, for confirmation of his possession of that property.

The Moonsiff's judgment was against the plaintiff, but the Judge in the Lower Appellate Court decided in his favour; and he did so with reference to the question which was treated by both Courts as the main issue in the case, *viz.*, whether the property claimed was purchased *bonâ fide* by the plaintiff himself, or by Abdool Ali in the plaintiff's name. If there had been any independent question, whether the plaintiff had ever been in possession of this property, that question should have been raised by a distinct issue before the Moonsiff; but no such issue appears to have been asked for by the defendant.

The question of the plaintiff's possession was undoubtedly dealt with by the Moonsiff, in fact, by both Courts, but only as an element in determining the main issue, whether this was a *bonâ-fide* purchase by the plaintiff, or a *benamee* purchase in his name for the benefit of his master. The rents of the property appear to have been collected by the plaintiff; and, if the purchase was made by the plaintiff for his master, then, no doubt, the collection of the rent would be considered as having been made by the plaintiff on his master's behalf. If, on the other hand, the purchase was made on the plaintiff's own account, the collection of the rents would, of course, enure to the plaintiff's own benefit.

In special appeal, two questions have been raised: *First*, whether the plaintiff, not having produced the original certificate of purchase, was at liberty to use a copy of it (what the Moonsiff calls a copy or extract from a book) as secondary evidence. Now, it does not appear from the case that the loss of the original was proved, but this copy was adduced in evidence, and no objection having been made to its reception, it was admitted in evidence by the Moonsiff. If any objection had been raised, it is possible that the loss of the original might have been proved, or the copy made evidence in some other way. But no objection being taken, and the copy being admitted in evidence by the Moonsiff, the Lower Appellate Court was at liberty to treat it as proved.

Then, *secondly*, it is said, that, although the Court below may be right in finding that the plaintiff is the rightful purchaser, and that the property belongs to him, yet, having regard to the way in which he has framed his plaint, he ought to be excluded from any benefit of that purchase; because, instead of asking for *recovery of possession*, he has asked for *confirmation of possession*, which can only be granted him upon his showing that he was in possession at the time of the suit being brought, or at some previous time; and, as it has not been expressly found that the plaintiff has ever been in actual possession of this property, his prayer for confirmation of possession cannot be granted.

But, if the plaintiff was really the rightful owner, and the collection of the rents was made by him or by others through him for his own benefit, then he was, in point of fact, in possession of the property, and this case would come distinctly within the principle of the decision in 16 Weekly Reporter, page 27, in which it was held that, where a plaintiff prays for confirmation of possession, and it appears upon the face of the proceedings that he was not in possession at the time of his bringing the suit, but was in possession at some previous time, his suit may be treated as a suit for recovery of possession.

If the plaintiff, therefore, in this suit was in possession of the property at one time by collecting the rents on his own behalf, he was justified, although he may not have been in possession at the time of the commencement of this suit, in asking for a confirmation of the possession which he at one time enjoyed. That being so, we gladly avail ourselves of the authority of this case, which is a decision by three of the Judges of this Court, for the purpose of preventing what otherwise would be a great injustice, *viz.*, that, while we decide that the purchase by the plaintiff in 1864 was *bonâ fide*, and that he is the real owner of the property, yet that the defendant should, by prosecuting appeals, first, in the Lower Appellate Court, and, then, to the High Court, be enabled to protract the proceedings until the plaintiff's right to possession would be barred by limitation. We consider, therefore, that we are at liberty to treat this as a suit for recovery of possession, and so to confirm the plaintiff in his rights.

The appeal will, therefore, be dismissed with costs.

If he finds in favour of the defendants on the question as to the right of occupancy, the plaintiff can raise no objection except such as the law allows. If, however, the question is found against the defendants, the Judge will have to consider their right under the pottah set up by them, for it is quite clear that, if that pottah is genuine, they cannot be ejected until its term expires.

The judgment of the Lower Appellate Court is reversed, and the case is remanded for re-trial with reference to the above remarks.

The 1st March 1876.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Decree-holder—Judgment-debtor—Execution of Decree—Omission of name in Execution.

Case No. 132 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 27th February 1875, reversing an order of the Moonsiff of Sarun, dated the 12th May 1874.

Baboo Mokoot Nath Pershad *alias* Foolyana Baboo (Judgment-debtor), *Appellant,*

versus

Gujadhur Pershad and another (Decree-holders), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Baboos Chunder Madhub Ghose and *Aubinash Chunder Banerjee* for Respondents.

The mere fact of a decree-holder having omitted to certify the names of some judgment-debtors on any former occasion on which he took out execution does not do away with the effect of the original decree against them.

Kemp, J.—We think this appeal must be dismissed with costs. The High Court, with the consent of the parties in the appeal before them, held that "after satisfaction of the first zur-i-peshgee of the respondent, decree-holder, the second zur-i-peshgee would remain in force and operation with respect to what the state of things would allow at the time after satisfaction of the first zur-i-peshgee." Then, with reference to the question of wassilat, the decree of the Sudder Ameen of December 1860, which is now being executed, clearly awarded wassilat against the defendants in that suit from [illegible] to the time of recovery of possession [illegible] all costs as against the defendants in [illegible] case. The mere fact of the decree-h[illegible] having omitted to certify the names of [illegible] judgment-debtors, appellants, on the [illegible] former occasions on which he took out e[illegible]tion, does not do away with the effect of [illegible] original decree, which is now being exec[illegible] The last application made to execute [illegible] decree is in time, and it includes the na[illegible] of the appellants before us as the judgm[illegible] debtors against whom execution is so[illegible] Pleader's fees, two gold mohurs.

The 6th March 1876.

Present:

The Hon'ble E. G. Birch and Romesh Chunder Mitter, *Judges.*

Sale of Tenure—Moveable Property—Sale [illegible] aside.

Case No. 421 of 1875.

Special Appeal from a decision passed by [illegible] Judge of West Burdwan, dated the [illegible] November 1874, reversing a decision of [illegible] Moonsiff of Bancoorah, dated the [illegible] December 1873.

Bama Soonduree Dossee (Defendant), *Appellant,*

versus

Mudhoo Soodun Biswas and others (Plaintiffs), *Respondents.*

Baboo Anund Chunder Ghosal for Appella[illegible]

Baboo Rash Beharee Ghose for Responde[illegible]

It being against the provisions of the law to sell up [illegible] tenure of a judgment-debtor before selling up [illegible] moveable property, HELD that the judgment-debt[illegible] omission to oppose the illegal sale of his tenure at [illegible] time of the occurrence of the sale does not kill his ri[illegible] to move for the setting aside of the sale afterwards.

Birch, J.—We think that the Judge[illegible] decision is right. There is nothing i[illegible] section 11, Act XXIII. of 1861, to preve[illegible] the plaintiff from bringing this suit. I[illegible] execution of a decree for arrears of re[illegible] against the plaintiff, his tenure was attach[illegible] in contravention of the provisions of secti[illegible] 64 of the Rent Law, which prohibit an ord[illegible] for the sale of an under-tenure until t[illegible] judgment-creditor shall have caused t[illegible] moveable property of the judgment-debtor t[illegible] be seized and sold in execution of the decre[illegible] The tenure was brought to sale and purchase[illegible]

the judgment-creditor. The plaintiff gs this suit to recover possession of the ls thus sold, by establishing his right eto and by reversal of the sale. The ge has held that the action of the Court execution was *ab initio* void, and that the ntiff is "at liberty to impeach the action he Court in a regular suit as contrary to ." And upon the merits he has decreed plaintiff's claim.

t is contended here that the plaintiff ld and ought to have raised objection at time of the attachment of the property l prior to its sale, and that, having omitted raise the objections when the proceedings execution were being taken, he cannot ng a suit to set aside the sale. We think t there is no force in this contention. If proceedings taken by the Court of execu- n were not in accordance with the law, re is nothing to prevent the party injured the action of the Court from suing to set m aside. Then it is said that, if the sale set aside, the defendant is left without nedy. If this be so, the defendant has ly himself to blame. The law prescribes a urse for him to follow; he took proceedings contravention of the provisions of the law, d those proceedings have, by the decision the Judge, been declared null and void. The special appeal is dismissed with costs.

The 17th December 1875.

Present:

r James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

ossession — Boundary — Previous Decision of Civil Court.

*n Appeal from the High Court of Judicature at Fort William in Bengal.**

The Court of Wards

versus

Raja Leelanund Sing.

In this suit, which is essentially one of boundary, hich has formed the subject of litigation for many ears, and on which an order had previously been made y Her Majesty in Council, HELD that the first ques- on to be now determined was what was decided by e judgment of the Judicial Committee of the Privy ouncil on the former appeal, and what was the order f Her Majesty in Council thereon; and that neither ny Court in India, nor the Judicial Committee itself, could go behind the above-mentioned decision and order. HELD also, accordingly, that so much of the judgment of the Calcutta High Court as re-opened what had previously been decided on fresh evidence must be set aside; but that the evidence that had thus been brought to bear upon the case was entitled to consideration in so far as it bore upon those portions of the suit in respect of which the former decision of the Judicial Committee was not conclusive.

THIS appeal and cross-appeal are the close of a litigation in which the parties, or those whom they represent, have been engaged for more than twenty years concerning the ownership of a large tract of land lying between lands admitted to form part of their respective zemindaries, and consisting, for the most part, of hills and forests.

The dispute is essentially one of boundary. The facts out of which it arose, and the earlier history of the litigation which has been the consequence of it, are very fully stated in the report of the case on the former appeal to Her Majesty in Council, to be found in the 10th volume of Mr. Moore's Indian Appeals. And their Lordships, to avoid an unnecessary recapitulation, will, whenever it is requisite to do so, refer to that statement as if it were incorporated in the present judgment.

The first, and not the least, material question to be now determined is what was decided by the judgment of the Judicial Committee on that former appeal, and the order of Her Majesty in Council made thereon; and what issues were left open for the determination of the Indian Courts under that order, so far as it was one of remand.

The appeal was that of Raja Leelanund Sing, the plaintiff in the suit. By his plaint he had parcelled out the disputed land in definite areas, treating them as appurtenant to different mouzahs which had been recorded as forming part of the Nizamut or settled mehals, and claimed to recover them as lying within the boundaries of those mouzahs. He had never, as is now admitted, been in possession of any part of the land which is now in question. He adduced a considerable body of evidence in support of the case made by his plaint. The Judge of first instance, however, held that he had entirely failed to make out that case, or to establish a title to disturb the possession of the defendant, and dismissed the suit. On appeal, two of the Judges of the then Sudder Court affirmed that decree of dismissal. They, too, were clear that the plaintiff had failed to prove his title as alleged. On the other hand they seem to have admitted that the defendant could have no title to anything that was

* From the judgment of Norman and E. Jackson, JJ., ated the 2nd March 1870.

Gowhurpore Sondari; but one of such former bonds affected Porbigha, and two of such securities affected another property called Sonkara.

The respondents allege, and the bond of 1867 recites, that, upon its execution, the former bonds (including the kistbundi bond of 1863) and securities were given up to the mortgagor.

The bond of March 1867 was registered, and its execution has been proved.

The appellants further allege that, on the 3rd April 1867, the mortgagor executed in favour of Amirunnissa a bond, hypothecating his 8 annas in Kokurea, to secure Rs. 1,000. This bond was registered.

The appellants further allege that, on the 6th of February 1868, the mortgagor sold and conveyed to them by registered deeds his paternal 8 annas in Kokurea for Rs. 35,000, of which Rs. 20,000 was paid to the mortgagor, and Rs. 15,000 retained by the appellants to pay off and get in Amirunnissa's securities.

These purchase-deeds were registered, and in 1869 the appellants paid off Amirunnissa, obtained her securities, and got possession from her of the mortgagor's 8 annas in Kokurea, which they have ever since held.

Previous to the bond of March 1867, the mortgagor's uncle died, leaving a widow and daughter, and considerable litigation occurred between the mortgagor and the widow as to the right to the uncle's 8 annas. It was eventually settled that the widow should remain for life in exclusive possession of all the uncle's property, and we have no doubt on the evidence that the widow was in such possession in March 1867.

Under these circumstances, the first mortgagee having died, the respondent instituted a suit, under the bond of 1867, against the mortgagor alone; and on the 26th March 1873 obtained a decree *ex parte*, directing a sale of the three properties hypothecated in the bond of March 1867.

In the execution-stage of that suit, the appellants intervened, claiming to be exclusively entitled to 8 annas of Kokurea, under their purchase-deeds. Their sole objection in such proceedings to the first mortgagee's bond of March 1867 was that by it the 8 annas in Kokurea, belonging to the uncle, and not to the mortgagor's paternal 8 annas, were hypothecated. They made no objection whatever to the validity of the bond as a security for the money purporting to be secured by it. But as the respondent was, in fact, proceeding to sell Kokurea before the other two properties, they made the further ob that such other two properties should sold.

Upon hearing their petition, the ordered the other two properties to b in the first instance, and it was probab belief of all parties at the time that th proceeds of Gowhurpore Sondari and bigha would be sufficient to pay off the m alleged to be due to the respondents.

At all events, the appellants made no o tion to the sale-proceeding on these ter

But after the sales of Gowhurpore Porbigha were completed, and the proc found to be inadequate, the appellants a further petition, objecting altogether sale of the paternal 8 annas in Kokure the ground that only the uncle's 8 ann Kokurea were hypothecated on the bo March 1867. And, upon this ground the appellant's objections were, by order the 18th of January 1873, allowed, an sale of Kokurea stayed.

We think that this was a wholly erro ground of decision. The recitals in appellant's purchase-deeds were sufficie themselves to show that the mortgagor no power of disposition over the unc annas, and it is ridiculous to suppose th first mortgagee, having, under his bon 1863, a first charge on the paternal 8 an would give up such charge.

The appellants up to this time had no objection on account of Gowhurpore Porbigha having been sold at an under v

The respondents were, in consequenc the order of the 18th January 1873, c pelled to institute the present suit to aside that order, and to obtain a sale Kokurea.

In their written statements the appell alleged :—

1st.—That the first mortgagee was aware of their purchase, and that the respo ents ought to have made them defend to their first suit.

2nd.—That only the uncle's 8-anna s was affected by the bond of March *1867*.

3rd.—That, upon their purchase, they asked Sheo Sahoy, the first mortgag whether he had any charge on the estate, he had replied that he had none; and

4th.—That the first mortgagee's bon were subsequent and "collusive" bonds.

The only attempt to dispute the validity of the first mortgagee's bond of 1867 as security for the amount it purported to secure is contained in that single word "collusive."

The Judge of Gya decided on the evidence

(and we entirely concur with him in so finding) that Sheo Sahoy did not pretend, or inform the appellants, that he had no charge on Kokurea; and he also found that the paternal 8 annas of Kokurea was hypothecated by bond of March 1867.

We also agree with him that the bond of March 1867 must be taken to be a substitution for the bond of 1863 and a continuation of the security thereby made, if the bond of 1863 was a valid security for the amount which it purported to secure.

It appears from the judgment of the Court below that in that Court the appellants did not attempt seriously to dispute the bond of 1863, but contended that, by the first mortgagee taking the new bond in 1867, the former security of 1863 was extinguished. The appellants neither in their petitions of objection in the first suit, nor in their written statements in the present suit, distinctly dispute that the bonds of 1863 and March 1867 were for adequate consideration, nor did they raise such question in the examination of the plaintiff or of the mortgagor, and in their grounds of appeal before us, they make no distinct objection in these respects.

The learned Judge, in the Court below, has given a decree, directing the sale of Kokurea and the application of the sale-proceeds to the discharge of the moneys, owing to the respondents on the bond of March 1867, and he has ordered the appellants to pay the costs of the suit.

Against this decree, the appellants have appealed, urging numerous grounds of appeal, but relying in argument before us on the following grounds only:—

4 and 5. That the respondents were bound to prove sufficient facts to entitle them to the decree and to establish their lien of 1863.

8. That the paternal 8 annas of Kokurea were not pledged in March 1867

11. That the evidence shows that the first mortgagee had notice of the sale to the appellants and stood by concealing his charge.

15. That the respondents have priority against the appellants only for the amount due under the bond of 1863.

21. That the respondents have purchased, under their decree, properties worth more than their mortgage-debt.

We entirely agree with the learned Judge's decision with respect to the eighth and eleventh grounds.

With respect to the fourth and fifth grounds, if the appellants had, in their written statements, raised any case for a stricter proof of the debts secured by the bonds of 1863 and March 1867, or had in the Court below disputed the amount claimed under them, we might have remanded this case for the respondents to furnish further evidence on the point. It is true that the seventh issue in the Court below may be considered as sufficient to put the respondents to a strict proof of their debt, but we are of opinion that the appellants' conduct of their case, both in the present suit and in the objection proceedings, amounted to a virtual waiver of any stricter proof than was furnished. Indeed we find the learned Judge saying: "It seems to me to have been thoroughly "proved that Gouri Baijnath did, on the "26th March 1863, mortgage to Sheo Sahoy "his paternal share of 8 annas in Ko-"kurea. Indeed, apart from mere denial, the "defendants have hardly attempted to seri-"ously impugn this position. They contend "rather that the bond of 1863 was extin-"guished by that of 1867." In fact neither party in the Court below seems to have disputed the validity or amount of the other's security, but to have confined their case to the question, whether the security of the other party would have any effect as against themselves. And we are of opinion that it is too late now to re-open this question.

With respect to the 21st ground of appeal, it is to be observed that, in the first suit, after the appellants had intervened, the respondents obtained leave from the Court to bid at the sales of Gowhurpore and Porbigha, but the application for such leave does not appear to have been made on notice to the appellants. As a matter of fact, however, it is clear that the appellants were aware that the respondents did bid, and became purchasers at such sales.

It may be that, if a sufficient case was made of fraud or undervalue, a purchase of mortgaged property made by a first mortgagee might be re-opened at the instance of a subsequent encumbrancer. But when we asked for an instance of any purchase being made at an undervalue, we were referred to the evidence of the mortgagor who stated (but whose statement we are not inclined to believe) that the first mortgagee had actually offered him Rs. 80,000 for his 8-anna share of Roua and Kodro, parts of Gowhurpore, and it was stated in argument before us that the respondents had purchased those two mouzahs in the execution-sale for something under Rs. 500. Upon further

investigation, it turned out, however, that the respondents had, in fact, given Rs. 31,100 for those two mouzahs, and had actually paid that amount into Court, and that the two mouzahs were subject to a zur-i-peshgee, which is still continuing, and which, upon the expiration of its term, must be redeemed by the respondents. We think, therefore, that no case has been made out with respect to these two mouzahs, and no other instance of fraud or undervalue has been adduced before us.

Nor, in fact, was that objection raised in the appellant's petition in the former suit. We are of opinion that it was for the appellants to prove any case of purchase, whether fraudulently or at an undervalue, and we think that they have entirely failed to do so.

With regard to the fifteenth ground of appeal, we think the decision of the Court below must be modified.

We are of opinion that the respondents representing the first mortgagee have priority over the appellants' securities of 1864, so far only as respects the amount due to them under the bond of 1863. And in the bond of March 1867, there is a recital binding on the respondents that, at that time, such amount did not exceed Rs. 10,400.

The parties are, in fact, entitled to priority in the following order :—

1. The respondents representing the first mortgagees for a sum not exceeding Rs. 10,400, with interest at one per cent. from the 12th March 1867.

2. The appellants for the Rs. 14,000 due on Amirunnissa's securities of the 11th February 1864, but without interest, as they have all along been in possession.

3. The respondents for the residue (if any) of the amount due to them under the bond of March 1867.

4. Any residue will belong to the appellants (defendants Nos. 1, 2, and 3).

Under the circumstances, it will be necessary to take the following accounts, which we accordingly direct the lower Court to take :—

1. An account of what remains due to the plaintiffs for the principal and interest decreed to them in their first suit on their bond of March 1867, after deducting all moneys realized by them in such suit.

2. An account of interest at the rate of 1 rupee per cent. per mensem on Rs. 10,400 from the 12th March 1867, until the day of payment to the plaintiffs of such pri amount as hereinafter directed.

3. An account of the plaintiffs' co this suit (not including their costs o first suit), both in the Court below and i Court (including their costs of the acc so directed to be taken).

4. An account of the appellants' of this suit, both in the Court below a this Court (including their costs of accounts so directed to be taken).

And we direct that the sale of the m gagor's paternal 8 annas in Kokure proceeded with (any party to this suit h liberty to bid at such sale).

And we modify the decree of the C below as follows :—

We direct that the moneys to be prod by the sale of the said 8 annas of Kok shall be paid and applied as follows :—

1st.—If the aggregate amount of 10,400 and the sum which shall be as tained under the second account hereinb directed, shall be still due to the pla under the bond of March 1867 as ascerta under the first account herebefore direc then in payment in full to the plaintiff the aggregate amount of the sum of 10,400 and of the sum which shall be as tained under the second and third acco herebefore directed. But if less than aggregate amount of the sum of 10,400 and the sum which shall be asc tained under the second account herebef directed shall be still due to the plaint under the bond of March 1867 as ascertai under the first account herebefore direct then in payment in full to the plaintiffs the aggregate amounts which shall be asc tained under the accounts 1 and 3 herebe directed.

2nd.—In payment of Rs. 14,000 to defendants Nos. 1, 2, and 3, rateably acco ing to their shares.

3rd.—In payment to the defendants of t amount to be ascertained under account No.

4th.—In payment to the plaintiffs of t balance (if any) of the amount to be asc tained under account No. 1 after deducti of the aggregate amounts of the sum Rs. 10,400 and the sum to be ascertain under account No. 2.

5th.—The residue (if any) to be divide between the defendants Nos. 1, 2, and 3, rat ably according to their shares.

And we direct the Court below to make all necessary enquiries and to take all necessary accounts for the purposes aforesaid.

Kemp, J.—I concur in this judgment.

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The 29th February 1876.

Present:

Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

nder s. 28, Act VIII. of 1869 (B.C.)—Deter-ation of Rent—Offer to Execute Pottah.

Case No. 580 of 1875.

ial Appeal from a decision passed by t Judge of East Burdwan, dated the th December 1874, affirming a decision the Moonsiff of Cutwa, dated the 4th ay 1874.

I. Reily, Officiating General Manager of e Land Mortgage Bank of India, Limited laintiff), *Appellant,*

versus

Judoo Nath Ghuttuck (Defendant), *Respondent.*

aboos Bhowanee Churn Dutt and *Kashee Kant Sen* for Appellant.

Baboo Kash Beharee Ghose for Respondent.

suit under s. 28, Act VIII. of 1869 (B.C.), asking Court to determine the rate of rent which plaintiff titled to receive, and offering to execute a pottah at rate, must be accompanied by an unconditional by the plaintiff to execute a pottah at the rate cted by the Court. The omission of such an offer tal to the claim: and plaintiff has no right to e it a condition to the execution of such a pottah all previous arrears should be paid at the rates to so fixed.

Markby, J.—In this case, there has been very considerable discussion as to what e true nature of the suit brought by the aintiff is, and there has been a difference opinion in the view taken by the oonsiff and by the Judge. The Moonsiff ppears to have considered the suit simply a suit for a kubooleut, and upon that he eld that the tender of a pottah was ecessary. The Judge, upon appeal, took different view. He considered that it was not a suit for kubooleut, but a suit to assess rent-free lands, and that, therefore, the tender of a pottah was not necessary. Upon that he remanded the case for an enquiry as to the rates of rent. But, subsequently, on an application for review, he was induced to hold that the suit was barred by the rule of limitation laid down in article 130, Schedule II. of Act IX. of 1871. On that the case has come before us upon appeal by the plaintiff.

Now, we are clearly of opinion that the Judge was wrong in the view which he took of the nature of this suit. The suit of the nature referred to in article 130 had already been brought. No such suit could again have been brought, nor do we consider that that is the nature of this suit. Then the appellant contends, that the view taken by the Moonsiff was also wrong, and contends that no tender of a pottah was necessary in this case; and that this is really a suit of the nature contemplated by section 28 of Act VIII. of 1869 (B.C.), namely, a suit asking the Court to determine the rate of rent which the plaintiff is entitled to obtain in respect of this land, and offering to execute a pottah at that rate; and he refers to a case reported in the Gap No. of the Weekly Reporter, page 82, to show that such a suit will lie. But even assuming that to be the nature of the suit, and that such a suit would lie (which we need not consider), there still appears to us to be an insuperable objection to the maintenance of the suit. It is at any rate clear that a suit of that kind must be accompanied by an unconditional offer by the plaintiff to execute a pottah at the rate directed by the Court. But this plaint contains no such offer. What the plaintiff asks is, that "the defendant be "directed to give kubooleut and receive "pottah (which the plaintiff is ready to give, "if the defendants are willing to be his "tenants) on account of the said lands at "rates which might be found recoverable "from the defendants on enquiry, and pay "all the arrears at the rates to be fixed as "aforesaid." The plaintiff has no right to make it a condition to the execution of this pottah that all previous arrears should be paid at the rates to be so fixed. There is nothing in the law which warrants him in doing so.

On these grounds, therefore, and not upon the merits of the case, we think that this present suit, framed as it is, ought to be dismissed. The result is, that, although we do not adopt the view taken by either of the Courts below, the decision arrived at is right. The appeal will be dismissed with costs.

The 7th March 1876.

Present :

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Deed-of-sale—Purchase by Wife during Husband's Lifetime.

Case No. 1143 of 1875.

Special Appeal from a decision passed by the Officiating Additional Judge of the Twenty-four Pergunnahs, dated the 11th March 1875, modifying a decision of the Moonsiff of Sealdah, dated the 19th May 1874.

Gunesh Junonee Debia, for self and as mother and guardian of Soorendro Nath Dhul, minor (Plaintiff), *Appellant*,

versus

Bireshur Dhul (Defendant), *Respondent*.

Baboo Hem Chunder Banerjee for Appellant.

Baboo Radhika Churn Mitter for Respondent.

Where the widow of one of three brothers claimed two-thirds of a dwelling-house which had been the joint family-property of the three brothers, on the ground that one-third fell to her as widow of the deceased and mother and guardian of his son, and that she had purchased the other third share from one of the brothers out of her own streedhun during the lifetime of her husband: HELD that, though it was equally difficult to prove that the purchase-money was streedhun, or that it was the joint property of the three brothers, yet, in the absence of evidence that the brothers had other joint property from which they derived joint profits of which the purchase-money could be treated as a part, the sale of the second third share to plaintiff under a genuine and valid instrument duly conveyed it to her and made it her property.

Garth, C.J.—THIS was a suit brought by the plaintiff, on her own behalf and as guardian and mother of her infant son, for the purpose of obtaining a partition of a family-house, in which she claimed two-thirds shares under these circumstances :

Her husband was one of three brothers who inherited the property in question from their father ; and her husband being dead, she, the plaintiff, claimed his one-third share of the house as his widow, and as to that there was no question.

Another one-third share of the house the plaintiff claimed to have purchased in her husband's lifetime from another of the brothers (Kalidas), and, as she alleged, the purchase was made with a portion of her own streedhun.

The third brother Bireshur was the defendant in the suit, and there was no question that he was entitled to the remaining one-third share.

The only question in the suit was as to the share alleged to have been purchased by the plaintiff from Kalidas; and as to this the Lower Appellate Court found as follows, that Kalidas had, in truth, conveyed his third share to the plaintiff by a genuine deed, but that it was not proved that the purchase-money formed part of the plaintiff's streedhun.

The Judge appears to have considered that, inasmuch as the purchase-money was not the plaintiff's, it must be presumed to have been furnished to her by her husband, and as her husband was a member of a joint family, living together in the family dwelling-house, the money so furnished must be presumed to be the joint property of the three, and consequently that, as Kalidas *had parted* with his share, the family dwelling-house must be considered to belong to the plaintiff and defendant (Bireshur) in equal shares.

Against this decision, the plaintiff appeals upon the ground that, under the circumstances, no presumption in point of fact arises; that the purchase-money was a joint family property; and that in the absence of any proof that the three brothers were entitled to any joint property besides the dwelling-house, the profits of which might have produced the purchase-*money* in question, that money must be taken to have been the separate property of the husband, in which case she would be entitled to Kalidas' share as heiress of her husband.

We think there is great difficulty in finding that the money was the separate property of the plaintiff's husband, because she herself has virtually denied that such was the case by insisting on its having been a portion of her own streedhun ; but at the same time we feel that there is also considerable difficulty in presuming the money to be joint *property*, inasmuch as the joint family do not appear to have possessed any property except the family dwelling-house.

Assuming, however, that we are unable to find that the money was the separate property of the husband, and that we are also unable to find for the reason already *given* that it belonged to the joint family, there still remains the undoubted fact, that wherever the purchase-money came from, Kalidas did, in fact, convey his share to the plaintiff.

husband's lifetime by a genuine valid ent, and, that being so, we see no ive but to decide that this share was nveyed to the plaintiff and is her ty.

consider, therefore, that the judgment Lower Appellate Court should be d, and that the plaintiff should be ed the owner of two-thirds of the g-house, the defendant, Bireshur, entitled to the remaining one-third and that a partition be decreed upon ais.

plaintiff will be entitled to recover the defendant, Bireshur, her costs in all urts.

The 8th March 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

dary Evidence—Copy of Mortgage-deed.

Case No. 1287 of 1875.

al *Appeal from a decision passed by Officiating Judge of Hooghly, dated 19th March 1875, reversing a decision the Moonsiff of Pandooah, dated the th June 1874.*

uhoorul Huq (one of the Defendants), *Appellant,*

versus

heer Chunder Mullick Shaha (Plaintiff), *Respondent.*

aboo Kalee Kishen Sen for Appellant.

Baboo Troyluckho Nath Mitter for Respondent.

here a suit had been brought upon a mortgage- and judgment for possession after foreclosure had passed, and a person requiring the original deed idence in a later suit had applied for it, but failed tain it, and had secured a copy, HELD that the erson had tried every means in his power to the original deed, and was entitled, under the nce Act, to give secondary evidence.

This is a suit to recover possession certain land which the plaintiff alleges purchased at an execution-sale. Both plaintiff and the defendant Zuhoorul q, who appears to be the only substantial endant in this case, admit that the land longed originally to Abbas Ali.

The plaintiff's statement is that from bbas Ali it went to his son Buzruck Ali; t Buzruck Ali mortgaged it to Abdool Huq; that a foreclosure-suit was brought and possession obtained by the mortgagee; that the land then went to Phaloo Meah, the heir of Abdool Huq; and that Phaloo Meah and his widow Ladoo Bibee held it until it was attached in execution of a decree against Phaloo Meah and sold, the plaintiff being the purchaser.

The defendant says that Abbas Ali gave the disputed land in lieu of dower to his wife Begum Bibee; that she sold it to her daughter-in-law Ameerun Bibee; that she, in her turn, sold it to one Chund, who again sold it to Romonee; and that Zuhoorul Huq, the present defendant, bought it from her.

The Judge, in a very long and detailed decision, has given judgment in favour of the plaintiff; and in special appeal it is urged, in the first place, that the Judge was wrong in admitting a copy of the mortgage-deed as evidence, the non-production of the original not having been duly accounted for. Though I do not agree with the Judge's reason with reference to this part of the case, yet I think that his decision, allowing a copy of the mortgage-deed to be put in as evidence, was right. The plaintiff being a purchaser would not have this mortgage-deed, nor would he know in whose custody it was to be found. But, knowing that there had been a suit brought upon it, and that a judgment for possession after foreclosure had been passed in that suit, he went to the Court which passed that judgment, and applied for permission to take out the original mortgage-deed filed on the record. Of course it was not filed there, and he was, therefore, not able to get it. Still his having gone there, and having tried every means in his power to get the original deed, gave him the privilege, under section 65 of the Evidence Act, to give secondary evidence. And I think the Judge was not wrong in allowing him to put in the copy produced from the record of the foreclosure-suit.

Then it is said that, under any circumstances, the Judge was wrong in saying that the whole of this property passed by inheritance from Abbas Ali to Buzruck Ali, because Abbas Ali left a widow, and, according to Mahomedan Law, she would be entitled to some portion of it. If this objection had been taken in the first instance, an inquiry would have been made with regard to it. The plaintiff distinctly alleged the way in which the property came to him, and the defendant did not traverse his statement in any way. And as it has not been noticed

in the judgment of either of the lower Courts, the probability is, I think, that no such question was raised, and therefore that there was other property belonging to Abbas Ali in which the widow had a share. At all events it is too late now to take the objection, it not having been taken at the time when it could have been properly inquired into.

These are the only two objections urged in special appeal, and as both fail, the appeal must be dismissed with costs.

The 13th March 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Co-plaintiffs—Deed of Sale.

Case No. 943 of 1875.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 1st March 1875, reversing a decision of the Second Sudder Moonsiff of that District, dated the 17th September 1874.

Audhur Chunder Pal and others (Plaintiffs), *Appellants,*

versus

Dwarka Nath Poddar (one of the Defendants) *Respondent.*

Baboo Oopendro Chunder Bose for Appellants.

Baboo Taruck Nath Dutt for Respondent.

Where one of three brothers was alleged to have sold certain land and old building materials to defendant, and the latter was only required to prove in the first Court the genuineness of the deed of sale which he produced, and did so, HELD that it was not open to the other brothers, who were co plaintiffs, to raise any question of their brother's right to dispose of their shares for the first time in special appeal.

THE objection taken in this special appeal is that, when the three co-plaintiffs all claimed a joint interest in the property, the on proving that it was the sole property of vendor was upon the defendant, and that point ought to have been inquired into.

The plaintiff Ramguttee at first joi with himself a younger brother, and afterwa a third brother came in, and, upon petiti was made a party to the suit. Their jo case was that their house fell down in cyclone, and that it remained in *statu* for a considerable time, but that, when length they went to repair or rebuild it, th were opposed by the defendant, and, therefo they brought this suit.

The defendant alleged that he bought land with the old building-materials upo from the plaintiff Ramguttee in 1279 B and got possession accordingly. He fi his kobala, which the Judge finds to proved.

Now, the plaintiff's case was a very sim one, and the only question raised in pleadings was whether or no the defend had proved his purchase. The plain knew what the defence was, but, instead making a further allegation that, even s posing the kobala to be authentic, Ra guttee could not dispose of their shares the ancestral property, they allowed issues to be fixed without reference to question of joint ownership, and were conte to rest their title to recover possession the failure of the defendant to prove kobala.

I do not think that it can be fairly urg on behalf of the two younger brothers, th they had no opportunity of showing th they also had a share in the premises. Th case was one with Ramguttee's, and th might, had they chosen, have had question of joint interest disposed of. It too late now, as it seems to me, to raise th objection.

Whether the Judge is right or not in estimate of what property becomes the jo interest of an undivided Hindoo family, I not think it necessary to determine. It enough to say that the plea of the youn brothers that they had a share which Ra guttee could not sell was never raised any stage of the case, although the co-plainti might have raised it had they been so minde

The appeal is dismissed with costs.

The 14th March 1876.

Present:

he Hon'ble F. A. Glover, *Judge.*

Accuracy of Ameen's Maps.

Case No. 1483 of 1875.

l Appeal from a decision passed by Judge of Moorshedabad, dated the h April 1875, reversing a decision of Moonsiff of Jungipore, dated the December 1874.

Amirta Lall Chowdhry (Defendant), *Appellant,*

versus

Pershad Shahi (Plaintiff), *Respondent.*

Mohinee Mohun Roy for Appellant.

aboo Sreenath Doss for Respondent.

accuracy of a thakbust Ameen's map, which is ed in the Evidence Act, means accuracy of drawing rrectness of measurement, but certainly does not o the laying down of boundaries according to hts of parties. To be binding on the parties to such a map must be supported by evidence that drawn in their presence or in that of their agents.

HE matter in dispute in this case is the ession of a mango tree. The plaintiff s it as situate in his estate of Nij Shere- and the defendant as belonging to his e of Khas Sherepore.

hese two estates were surveyed within boundary, although the plots in each are ked with different numbers.

he question which has been raised in ial appeal is that the Judge, in deciding the plaintiff has proved that the mango belongs to his estate, has given the go-by piece of evidence of extreme importance, ely, the report and map of the thakbust Ameen which showed that this mango tree was situate within the lands of Khas Sherepore, and not in Nij Sherepore. The Judge, no doubt, has made no mention of this map, nor can I find that any notice has been taken of it by the Moonsiff. The reason, I suppose, although the map is undoubtedly on the record, is, that there was no evidence to show that it was proved to have been properly drawn up and made in the presence of the parties. It is said that, under section 83 of the Evidence Act, the Court must presume that this map, which purports to be made by the authority of Government, was so made and is accurate. But I think the word "accurate" there means accuracy of the drawing and correctness of the measurement. It certainly does not refer to laying down boundaries according to the rights of parties. If it were so, a Deputy Collector would be usurping the functions of the Civil Court. We may assume that this map was correctly drawn according to the scale on which it is said to have been prepared, but that is all. Then, is there any evidence on the record that this map was drawn up with the approval of both parties? If it were so drawn, it would be evidence of the fact that, at a certain time, this land was measured in the presence of both landlords, and that this tree, at that time, was admittedly within the boundary of Khas Sherepore. But no witnesses have been examined to prove this fact; and, although the margin of the map shows the signatures of several persons who are said to be the gomashtas of the parties, there is nothing to show who were the gomashtas of the plaintiff and who were the gomashtas of the defendant, I cannot, therefore, say that the Judge has committed any error in law in not taking this map into consideration. Besides, I do not think that it would be evidence of any weight, either one way or the other. So that after all (if the Ameen's report be put out of the question, and that report cannot possibly be evidence against the plaintiff in this case) the Judge was not wrong in saying that there remained nothing but the oral evidence; and on that evidence he has decided the case in favour of the plaintiff. As to whether he has decided rightly or wrongly is not a ground of special appeal. He has gone into the depositions of the witnesses on both sides, and, after consideration of it, he has come to the conclusion that that for the plaintiff is better than that for the defendant. This is a finding of fact. This appeal must be dismissed with costs.

The 14th March 1876.

Present :

The Hon'ble F. A. Glover, *Judge.*

Dispossession—Cause of Action.

Case No. 1448 of 1875.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 29th March 1875, affirming a decision of the Officiating Moonsiff of Nurail, dated the 30th September 1874.

Seetul Chunder Bhuttacharjee (Plaintiff), *Appellant,*

versus

Judoonath Bose and others (Defendants), *Respondents.*

Baboo Bungshee Dhur Sen for Appellant.

Baboo Mutty Lall Mookerjee for Respondents.

Where plaintiff contended that defendant had come in between him and his tenant and dispossessed him by carrying off the produce of the land, HELD that, as the kubooleut, if genuine, was for the payment of rent, no dispossession could take place in the carrying-off of the crop, and that there was consequently no cause of action.

I THINK that this suit ought to have been dismissed at once. The plaintiff claimed to have it declared that defendant No. 3 is his ryot, on the ground that, by some collusion between her and the defendant No. 1, the latter was set up as a middleman, and so prevented him (plaintiff) from getting rent direct. The act of dispossession, it is said, was the forcible carrying-off of the crops by defendant No. 1. But this would give no cause of action, for the plaintiff had no right to the crops, but only to the rent of the land; so that the dispossession complained of by the plaintiff was no dispossession at all, and he had no cause of action.

But to go into the case as it has been gone into by the Courts below. The plaintiff alleged that defendant No. 3 was his ryot, and, in order to prove that, he produced a kubooleut said to have been given by her (the defendant No. 3's) husband. The first Court found the kubooleut not proved. The Judge does not say distinctly whether it was proved or not, but he says "there is a lamentable deficiency of evidence "that it was ever acted on, or that the rent has, "during the past ten years, been paid to the "plaintiff. I think the plaintiff has failed to "make out any sufficient case for a "in the face of defendant No. 3's de "direct tenancy under the plaintiff." T this in conjunction with the finding co by the Moonsiff, it must, I think, be stood as a finding on the part of the J in concurrence with the first Court th kubooleut had not been proved, and th plaintiff had failed to prove the relatio of landlord and tenant between him an defendant No. 3.

Then it is said that the onus was o defendant to show that he had a middle tenure. As the plaintiff brought his I doubt very much whether the onus on the defendant. But, supposing it is quite clear that the first Court's fi in favour of the defendant was come the evidence adduced by him. And, Judge has upheld the decision of the Court, I suppose he must be taken as h upheld this finding also.

Under any circumstances there i ground of special appeal in this case. appeal is dismissed with costs.

The 15th March 1876.

Present :

The Hon'ble F. A. Glover, *Judge.*

Former Decision—Evidence.

Case No. 1608 of 1875.

Special Appeal from a decision passed the Officiating Additional Judge of 24-Pergunnahs, dated the 27th A 1875, affirming a decision of the Mo of Satkhira, dated the 17th August 187

Anund Chunder Chund (Plaintiff), *Appellant,*

versus

Gunee Gazee and others (Defendants), *Respondents.*

Baboo Nil Madhub Bose for Appellant.

Baboo Gopal Lall Mitter for Respondents.

Where the boundaries of a piece of land, as given respectively in a sale-certificate and in a plaint, serv

ify it as the land in respect of which a former n has been passed, then, although the present of the land may not be the legal representatives persons who were bound by the former decision, decision is entitled to consideration as evidence part of the plaint.

AM afraid this case must be remanded. ake the order with very great unwilling- , because, in the first place, the amount lispute is very trifling; and, secondly, I bt very much whether the special appel- will be benefited by it.

is clear from the Judge's decision that has not considered the decision of the of April 1867. He seems to think that boundaries in the sale-certificate may be ical with those claimed in the plaint, he gets over this by saying that that sion is not binding on the present defend- s, as they are not the representatives of booddeen Gazee against whom the deci- n was passed. Now, although the present endants may not be the legal representa- es of Jirobooddeen, still, under section of the Evidence Act, the decision passed this case would be evidence of some sort favour of the plaintiff in the present case; d if, as the Judge seems to suppose, e boundaries in the sale-certificate e identical with those in the plaint, it ay be very strong evidence. It is not at the Judge has pronounced a very strong inion against the oral and other evidence duced by the plaintiff. Had he done so, e case probably would not have been manded for consideration of that decision. t the Judge's opinion on the plaintiff's dence does not seem to be very decided. speaking of it he uses the words "it es not go far enough," and other expres- ons of that sort. It is not impossible that, the decision of 1867 had been considered ith the oral and other evidence of the aintiff, it might have proved his case. At l events the plaintiff has a right to have at decision considered.

The case is remanded to the Judge for a esh decision with reference to the above emarks.

Costs will follow the result.

The 15th March 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Khamar Land—Right of Occupancy—Limitation.

Case No. 1660 of 1875.

Special Appeal from a decision passed by the Judge of Jessore, dated the 7th May 1875, affirming a decision of the Moonsiff of Khoolneah, dated the 26th November 1874.

Hurish Chunder Dam (Plaintiff), *Appellant,*

versus

Gunga Dhur Bhuddro and others (Defendants), *Respondents.*

Baboo Bungshee Dhur Sen for Appellant.

Moonshee Serajul Islam for Respondents.

Land in the possession of the zemindar, whether cultivated or uncultivated, is khamar land; and a right of occupancy cannot be acquired upon it by a ryot, except under some special arrangement.

THIS appeal must be dismissed with costs.

I should doubt whether the Judge was right in applying the one year's law of limitation, inasmuch as the party against whom the suit is brought is not one who is entitled to receive rent of the land. However this may be, it appears to me that the finding of the Court below on the question of the right of possession is sufficient to dispose of the case.

It is contended that the word "khamar," in section 6 of the rent-law, refers to land in the actual possession of the zemindar, and not to every piece of jungle or waste land included in his zemindaree. But it seems to me that the word "khamar" refers to any parcel of land, whether cultivated or uncultivated, belonging to the zemindar, and which the zemindar chooses to keep in his own possession. Every piece of land which the zemindar keeps under his own special control would be khamar land within the meaning of the section.

Then supposing this land to be khamar land, as the possession of the plaintiff is said to extend some years beyond the period conferring a right of occupancy, would that be sufficient to give him a right to recover possession of the land? Long possession in respect of khamar lands does not, as distinctly laid down by the section, give a right of occupancy. There is no presumption, therefore, in favour of the ryot from the

fact of his having been more than twelve years in possession of the land. On the contrary, the presumption would be that he was in possession for a term or year by year as a tenant. If he wishes to get rid of the limitation, it will be for him to show that he had made some arrangements with the zemindar, which brought him within the category of ordinary ryots, and gave him a right of occupancy. The plaintiff in this case has endeavoured to establish this position by claiming the land as his jumai. Both the lower Courts, however, have found that he has failed to prove this tenure. He falls, therefore, into the position of a ryot in possession of khamar lands belonging to the zemindar. And it matters very little whether he has been in possession of them for one or for twenty years, unless he can show some arrangement between himself and the zemindar in respect of them, enabling him to get a right of occupancy.

I think that the decision of the Lower Appellate Court is right, and the special appeal must be dismissed with costs.

The 16th March 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Judgment-debtor—Release from Jail.

Case No. 15 of 1876.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 21st December 1876.

Syud Abdool Settar (one of the Judgment-debtors), *Appellant,*

versus

Mussamut Mahkum Kooer (Decree-holder), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Baboo Taruck Nath Sen for Respondent.

Where a judgment-debtor applied from jail own release, putting in an affidavit, and afte deposition on oath to the effect that he had no whatever to satisfy the decree against him, was incumbent on the decree-holder to prove statements were false, and that, in the absence evidence, the judgment-debtor was entitled to charge.

Glover, J.—We think that this must be allowed, and the Judge's ord aside.

The application with which we are cerned now was made by the judg debtor from jail, under section 280 Civil Procedure Code. It was supp first, by an affidavit, and, afterwards, deposition on oath to the effect that judgment-debtor, had no property wh to satisfy this decree for costs. Suc application being made and supported affidavit and deposition on oath, it was in bent upon the decree-holder, under se 281, to show that the judgment-debtor making a false statement as to his means as to his not being able to pay the under this decree. But the decree-h has done nothing of the sort. On the side, therefore, we have the sworn state of the judgment-debtor that he had means, and on the other, as far as we see from the record, absolutely nothing.

The Judge says that, in his opinion, judgment-debtor appeared to have m enough, because, when the case was pend he and his father were able to meet e contingency. But it is not denied th appellant's father is a man of means; the fact of his being paymaster in this is not sufficient to prove that the son w a position to satisfy this decree.

With regard to the bond, the Judge self goes so far in the applicant's favour admit that the omission in the schedule not fraudulently made. Then there is sworn testimony of the judgment-debtor although his name is in the bond, he merely *benamee* for his father. There therefore, on the one side, the testimony oath of the judgment-debtor, and on other nothing but the Judge's idea of honesty.

The decision of the Judge must be versed with costs, and the judgment-debt be released from jail.

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The 16th March 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Execution-sale—Irregularity.

Case No. 362 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 27th September 1875.

Joynarain Giri (Judgment-debtor), *Appellant,*

versus

Soluck Chunder Mytee, father and guardian of Grish Chunder Mytee, minor (Decree-holder), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

Where, in an execution-sale, there had been some irregularity which left it doubtful whether the judgment-debtor had been duly apprised of the sale of his dwelling-house, HELD that the irregularity had caused material injury to the judgment-debtor, and that the sale must be set aside.

Mitter, J.—As regards the house at Kishtonuggur, the District Judge has found that there was material irregularity in the sale. But he is of opinion that, in consequence of that irregularity, the debtor has not sustained any injury. The reason he assigns for coming to this conclusion is that, by the defect in publishing the sale-notification in the Mofussil only, intending purchasers about the locality were not informed of the sale. The District Judge also thinks that this being a share of the dwelling-house of the debtor, if the debtor was aware of the impending sale, he would have himself attempted, or induced some friends, to purchase it for him. He has also come to the conclusion that the debtor was informed of the sale, notwithstanding the irregularities in publishing the sale-proclamation.

Assuming for the sake of argument that the District Judge was right in thinking that there were no available purchasers in the neighbourhood who would have purchased this property, still we are not satisfied that there is sufficient evidence on the record to show that the debtor was aware of the impending sale. The only evidence that has been relied on is a receipt which was given by an employé of the debtor of the actual execution of the attachment process. This it seems to us is not sufficient evidence upon which he can come to the conclusion that the debtor was aware of his family dwelling-house having been attached and advertized for sale. Stronger evidence is necessary to induce us to believe that he would allow his dwelling-house, which, from the evidence on the record, appears to have cost at least 37 or 38 thousand rupees for construction, to be sold for the trifling sum of 1,325 rupees. We are of opinion that it has not been shown in this case that the judgment-debtor was really aware of his dwelling-house having been advertized for sale. Therefore, from the Judge's own finding, it is clear that the irregularity in conducting the sale has caused material injury to the debtor. We, therefore, reverse the sale of the debtor's house at Kishtonuggur, and direct the purchase-money, if any has been paid by the purchaser, to be refunded to him under the provisions of section 258, with interest at six per cent. per annum from the date of payment to the date of refund.

The sale of the other property is confirmed.

Each party will bear his own costs.

The 17th March 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Demarcation of Land—Indirect Notice.

Case No. 245 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 26th May 1875, affirming an order of the Subordinate Judge of that District, dated the 18th July 1874.

The Collector of Monghyr (Judgment-debtor), *Appellant,*

versus

Bhobany Pershad (Decree-holder), *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

In execution of a decree for possession of land, an Ameen having been deputed to demarcate the land, the

defendant pleaded, nearly a year after the demarcation, that he had been entirely ignorant of the Ameen's proceedings: HELD that an opportunity should be given to the defendant of substantiating his plea; but that, if plaintiff could prove that defendant had even indirect notice of what was transpiring, the lower Court should refuse to go into the question after so long a delay.

Miller, J.—THE question raised in this case by the appellant, who is the defendant against whom a decree for possession of land has been passed, is that in execution of that decree lands in excess of the quantity actually decreed have been made over to the plaintiff, decree-holder.

It appears that, on the 13th of May 1872, an order was passed by the Court executing the decree for deputing an Ameen to demarcate the lands decreed in favour of the plaintiff, and making over possession of the same to him. The Ameen went to the locality in June 1872, and in July of that year carried out that order. Nearly a year after this, that is, in May 1873, the defendant made an application raising the present objection, and alleging that he had no notice of the Ameen having been deputed to demarcate the lands decreed.

Both the lower Courts have declined to enter into this objection, and have held that the defendant was not concluded by this proceeding, and that it is still open to him to have this matter settled in a regular suit.

It is doubtful whether, under the circumstances mentioned above, the defendant can maintain a suit for the rectification of an error which has been caused by the executing Court in delivering over possession of the lands decreed. Be that as it may, it seems to us clear that the question raised by the defendant clearly comes within the purview of section 11 of Act XXIII. of 1861; and therefore, if the defendant can substantiate his objection, and if he can show that the proceedings of the Ameen were held in his absence and without any notice on him, we think that he is entitled to have this matter inquired into by the executing Court in this proceeding. It will also be open to the plaintiff, decree-holder, to show that, notwithstanding there was no formal notice given to the defendant, still the latter had knowledge through any other source of the fact that an Ameen was holding proceedings in the mofussil with a view to demarcate the lands decreed, and to make over possession of the same to the decree-holder. If it be established that the defendant had directly or indirectly notice of the Ameen's proceedings, the lower Courts, we think, in that case would be justified in refusing into this question after the delay of from the date in which the proceedings closed by the Ameen in the mofussil, if, on the other hand, it be establishe the defendant had no notice and nothing of the proceedings of the A we think that, for the interests of justic objection made by him should be inq into by the executing Court.

With these directions, we remand the to the Court of first instance.

Costs will abide the result.

The 20th March 1876.

Present:

The Hon'ble F. B. Kemp and E. G. *Judges.*

Minor Plaintiff—Appointment of Guard

Case No. 33 of 1875.

Regular Appeal from a decision passe the Second Subordinate Judge of P dated the 21st December 1874.

Moorlee Dhur (Plaintiff), *Appellant,*

versus

Nathonee Mahtoon and others (Defenda *Respondents.*

Messrs. C. Gregory and *M. L. Sandel Baboo Chunder Madhub Ghose* Appellant.

Baboo Mohesh Chunder Chowdhry f Respondents.

Where a defendant contended that a suit agai could not be carried on without a guardian, be the plaintiff was a minor, and the Subordinate held that the onus of proof of his majority l plaintiff who had failed to sustain it, and dis the suit, the High Court remanded the suit to the S dinate Judge for the appointment of a guardian *ad* to carry on the suit.

Kemp, J.—THE plaintiff, who is appellant, brought the suit in the Cou the Subordinate Judge of Patna. The ground taken in the written statemen the defendants was, that the plaintiff this day a minor, and the suit cannot th fore be carried on without a guardian. issue was framed: "Whether the plaint minor or major?" The Subordinate J held that the suit could not be proce with, because the defendants had raised objection that the plaintiff was yet a mi and the plaintiff was bound to prove

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jority by filing his horoscope and citing atives as witnesses, but that he entirely ed to do so. The Subordinate Judge serves that the plaintiff examined only o witnesses, neither of whom are relatives the plaintiff, and that their evidence is ntradictory of each other, as one of them, et Narain, says that the plaintiff is 21 rs of age, whereas the other, Kunhya Lal, s he is only 12 years old. The Subor-nate Judge then says that "judging from intiff's features as he now stands before , there is no doubt as to his minority," and dismissed the suit with costs.

We think that the suit ought to be re-nded. The Subordinate Judge must point a guardian *ad litem* to carry on the t for the plaintiff.

Each party to pay their own costs in both urts.

The 20th March 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Mortgage—Execution-sale—Redemption of Lien—Liability of Ancestral Property.

Cases Nos. 1236 and 1237 of 1874.

Special Appeals from a decision passed by the Judge of Bhaugulpore, dated the 17th March 1874, modifying a decision of the First Subordinate Judge of that District, dated the 14th July 1873.

Ram Sahoy Singh (one of the Defendants), *Appellant,*

versus

Mohabeer Pershad and another (Plaintiffs), *Respondents.*

Baboos Kalee Mohun Doss and *Nil Madhub Sen* for Appellant.

Mr. M. L. Sandel and *Baboo Chunder Madhub Ghose* for Respondents.

Cases Nos. 1446 and 1447 of 1874.

Jhoomuk Singh and another (Plaintiffs), *Appellants,*

versus

Kesho Lall and others (Defendants), *Respondents.*

Mr. M. L. Sandel for Appellants.

Mr. R. E. Twidale for Respondents.

Case No. 1470 of 1874.

Mussamut Phool Kooery, mother and guardian of Jung Bahadoor Singh, minor (Plaintiff), *Appellant,*

versus

Gopee Singh and another (two of the Defendants), *Respondents.*

Mr. M. L. Sandel for Appellant.

No one for Respondents.

Cases Nos. 1631 and 1632 of 1874.

Kesho Lall and another (two of the Defendants), *Appellants,*

versus

Mohabeer Pershad and another (Plaintiffs), *Respondents.*

Mr. R. E. Twidale and *Baboo Boodh Sen Singh* for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

In a series of suits for partition of twelve different properties alleged to constitute a joint family property and for a declaration that the shares to be assigned to the plaintiffs should be free from the bond-debts contracted by their father—some of the said properties having been sold in execution of decrees obtained by mortgagees against the father: HELD that the properties should not have been allowed to be sold after these suits were instituted, but that the debts not having been contracted for immoral purposes, the ancestral property was liable for them, and that the plaintiffs could not in this special appeal claim to be allowed to redeem the different liens originally created onthe family-property.

Markby, J.—THESE seven special appeals arise out of three suits instituted by three sons of one Chowa Singh. These suits were instituted against the father Chowa Singh and four other persons who held five bonds executed by the father, in which various properties were hypothecated as collateral security. The suits were brought under the Mitakshara law for partition of twelve different properties which were alleged to constitute the joint property of the family, and for a declaration that the shares to be assigned to the plaintiffs would be free from the burden of these bond-debts. Before the institution of these suits, decrees had been obtained against the father Chowa Singh upon three of these bonds, and in execution of these decrees seven out of the twelve properties in suit

have been sold while these suits were pending decision in the Court of first instance, and purchased by the decree-holders themselves. So far as the suits against the father were concerned, they were virtually undefended. The Court of first instance considered all these bond-debts binding upon the sons, and accordingly decreed partition of the five properties which had been left unsold, dismissing the suits wholly against all the defendants other than the father. On appeal the District Judge, with the exception of the bond in favour of the defendant Gopee Singh, held that the four other bond-debts were not contracted for the benefit of the joint family. But as regards Jhoomuk Singh, the eldest son, he found upon the evidence that he was a consenting party to all of them. He was therefore of opinion that all of them were binding upon Jhoomuk Singh, plaintiff, but the other two plaintiffs, with the exception of the bond and decree in favour of the defendant Gopee Singh, were not to be affected by them.

In special appeals Nos. 1236 and 1237, the defendant Ram Sahoy, and in special appeals Nos. 1631 and 1632, the defendants Kesho Lall and Chundee Pershad, have appealed against the two successful plaintiffs respectively. In Nos. 1447 and 1470, these two plaintiffs have appealed against Gopee Singh, and No. 1446 is Jhoomuk's appeal against all these defendants.

As regards Jhoomuk's appeal No. 1440, the Lower Appellate Court found that he was a consenting party to all these bond transactions. This is a finding of fact with which we cannot interfere in special appeal. This special appeal must therefore fail. We accordingly dismiss it with costs.

The District Judge finds that the loan upon the bond executed in favour of Ram Sahoy was raised for the purpose of paying the zur-i-peshgee of a farming lease which was taken by Chowa Singh, but this lease transaction ultimately resulted in a loss. The Judge was, therefore, of opinion that it could not be considered as a joint-family debt, having been contracted for the purpose of a mere speculation by the father.

It has been urged in special appeal, on behalf of Ram Sahoy, that this decision is erroneous in law. According to Mitakshara law, it is contended the son is not entitled to plead exemption from the liability of the father's debts unless they have been contracted for immoral purposes. In support of this contention, a decision of the Judicial Committee of the Privy Council, reported in page 187 of the 14th Volume of the Bengal Law Reporter,* has been quoted. The a rity quoted fully supports this conte unless it can be distinguished from this in the way in which it has been atte to be distinguished in the course of argument of these special appeals. It been said that the decision in question not lay down any general proposition of applicable to all sorts of debts, but si holds that a son is bound to pay debts tracted by the father before his birth. have referred to the record of that ca ascertain whether the debt referred to th was of this nature. The result of our ence has been that we are fully satisfied the decision of the Privy Council canno distinguished from this case upon the gr mentioned above. There also the loan r by the father, and which was held bin upon the son, was contracted several y after the birth of the latter. Therefore, the finding of the Lower Appellate C as we cannot say that the loan from Sahoy was raised for any immoral pur the contention on behalf of the special ap lant must prevail, and the special app Nos. 1236 and 1237, must be decreed costs.

The loan from the defendant Gopee Si was taken, as has been found by the Lo Appellate Court, to pay the amount of a de against the father in execution of w family-property was advertised to be s Upon the authority of the case quoted be us, we must hold, concurring with the Dis Judge, that the ancestral property is li for this debt also. The special appeal behalf of the sons, *viz.*, Nos. 1447 and 1 against Gopee Singh, must therefore be missed with costs.

Kesho Lall and Chundee Pershad, spe appellants in Nos. 1631 and 1632, are hold of the three remaining bonds. As reg one of them, the finding of the Judge be precisely similar to that respecting R Sahoy's bond, the plaintiffs must be h bound to discharge that debt. With exception of a trifling amount, it has been shown for what purpose the loans up the other two bonds were raised. But t being debts contracted by the father, acco ing to the principle laid down in the Pri Council case quoted above, the ancest property of the family in the hands the sons would not be exempt from the liability unless they be established to hav been made for immoral purposes. The learne

* 22 W. R. 56.

eader who argued these special appeals behalf of the plaintiffs asked us to remand ese special appeals for the Judge to come a finding upon this point. But we do t think that we would be justified in opting that course. It is for the sons to tablish their exemption from the liability these loans; and they have examined veral witnesses who have given more or s vague evidence as to the general pro-gacy of the character of their father. The urt of first instance expressly held that is evidence was not credible. The District dge impliedly endorsed that opinion in pect of some of these bonds. Although has given no opinion upon this point with ference to these two loans, yet we do not nk that the plaintiffs will gain anything we remand these special appeals to him. e evidence referred to does not touch any e of these transactions directly, and it is vague that it is not possible that it would d to the conclusion that these debts were tracted for immoral purposes. We must refore uphold all these transactions also, hold that the family-property is not mpt from their liability. We accordingly ree these two special appeals with costs. t remains now to notice the prayer of plaintiffs, which was made orally to us he conclusion of the argument in these es. It is that as the joint family-estate been now declared liable for all these ts which were secured by hypothecation several properties, they should be allowed these suits to redeem them upon an ount being taken, although they have n sold while these suits were pending execution of decrees and purchased by rtgagors, decree-holders, themselves. We strongly of opinion that those properties, er the suits were instituted, ought never have been allowed to be sold. But they e been sold apparently without any pro-t on the part of the plaintiffs, and after y were sold and taken possession of by the rchasers, the plaintiffs put in an applica-n for the reversal of these sales. They er asked to have them restored to the t family by allowing them to redeem the ferent liens originally created upon them; d from the peculiar nature of these suits y could not consistently make that prayer. is possible that they may be allowed to so in a suit which may be properly framed aud brought for that purpose; and upon that question we express no opinion. But it is clear that they cannot in these suits obtain that relief.

The 20th March 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Mortgage—Priority of Lien—Order of Satisfaction of Decree.

Case No. 223 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 13th July 1874.

Gopee Sing (Defendant), *Appellant,*

versus

Baboo Kisha Lall and another (Plaintiffs), *Respondents.*

Baboos Kalee Mohun Doss and *Nil Madhub Sen* for Appellant.

Mr. Ameer Ali and *Moonshee Abdool Baree* for Respondents.

Where seven different properties, belonging to the same mortgagor, had been hypothecated to three different persons, and all of them sued upon their bonds and obtained decrees which were followed by simultaneous sales in execution, HELD that, as all the properties were sold at the instance of all the mortgagees for the satisfaction of their decrees, the decrees of the mortgagees should be satisfied out of the entire sale-proceeds in the order in which the liens on the properties had been created.

Markby, J.—THIS was a suit to recover Rs. 5,327-3 from the defendant, being part of the sale-proceeds of certain properties sold in execution of mortgage decrees against one Choa Singh. On 28th October 1867, Choa Singh mortgaged in a bond, executed in favour of one Ram Sahoy, three of these properties, which we shall, for the sake of brevity, call properties Nos. 1, 4, and 7. On 11th March 1870, Choa Singh similarly executed a bond in favour of the plaintiffs, in this case mortgaging again these very properties, and also four other properties, which we shall call Nos. 2, 3, 5, and 6. Thus the plaintiff's mortgage-bond covered all the seven properties, Nos. 1 to 7, which were sold in auction Last of all Choa Singh, on 1st December 1871, executed a third bond in favour of the defendant Gopee Sing, hypothecating Nos. 2 and 4 out of

these seven properties. All the parties obtained decrees against Choa Singh upon these bonds, and in execution of their decrees attached respectively the properties hypothecated in their respective bonds. The properties were advertised to be sold on one and the same day, *viz.*, 17th February 1873. On that day they were all sold, and properties Nos. 1 and 2 were purchased by the plaintiffs, Nos. 3, 4, 5, and 6 by the defendant, and No. 7 by Ram Sahoy. On that date the amounts due under their decrees respectively were as follow :—

		Rs.	As.	P.
1.	Due to the Plaintiffs ...	7,011	12	5
2.	„ Ram Sahoy...	5,865	14	2
3.	„ Defendant ...	5,044	10	0

The properties were sold and purchased by the mortgagees at the following prices :—

No. 1 for 1,600 Rs. } purchased by the
„ 2 „ 600 „ } plaintiffs.

Total Rs. 2,200

No. 3 for 700 Rs. }
„ 4 „ 3,325 „ } purchased by the
„ 5 „ 1,400 „ } defendant.
„ 6 „ 1,125 „ }

Total Rs. 6,550

No. 7 for Rs. 4,100, purchased by Ram Sahoy.

The purchasers did not pay in cash the respective amounts of their purchase-money, but were allowed to set them off against the amounts of their decree. The defendant's decree being for an amount less than the purchase-money of the properties purchased by him, he was ordered to deposit the balance, which was paid over to Ram Sahoy. In this way both the decrees of the defendant and Ram Sahoy were satisfied, but the plaintiff's decree was reduced only by 2,200 rupees, the total amount of the purchase-money of the properties purchased by him. The plaintiffs' contention is that the defendant was bound to deposit the whole of his purchase-money, and they were entitled to be first satisfied out of it. The defendant substantially rests his defence upon two grounds, *first*, that the suit cannot proceed without Ram Sahoy being made a party to it; and, *secondly*, that, under the circumstances stated above, his decree was entitled to priority. The lower Court overruled both these objections, and gave a decree for 4,811 rupees 12 annas, which was the balance due to the plaintiffs under their decree. defendant has preferred this appeal, an raised before us the same objections which he rested his defence in the below.

Whether or not these objections are would depend upon the determination o question, what were the rights that really brought to sale. Both the plai and the defendants think that the prope were sold in execution of the plai decree alone, and the lower Court has ed that view. Notwithstanding that parties are agreed upon this point, it is to us to put our own construction upon sale-proceedings which constitute the evidence on the record bearing upon question. These proceedings are two number, one recorded on the day of the and the other on the 25th April 1873, firming the sale. After perusing these ceedings, we think that the reasonable struction that we ought to put upon them that all the properties were sold at instance of all the mortgagees for the satis tion of their decrees, and therefore from their respective mortgage liens.

This being our view of the sale-proce ings, it is clear that Ram Sahoy, being holder of the first bond, in which prope Nos. 1, 4, and 7 were hypothecated, entitled to be first satisfied out of the proceeds of these properties. Referrin the figures given above, it will be seen the amount due under his decree was co derably less than those sale-proceeds ; consequently his decree having been ri satisfied first, he is in no way conce with the question at issue in the pr case, which is, whether the plaintiffs or defendant should rank next. Therefore first objection raised before us fails. T as regards the other question, after the struction which we have put upon the proceedings, it hardly admits of any d that the plaintiffs, being the holders of next bond in point of date, in which all seven properties were hypothecated, w entitled to be satisfied out of the residu the sale-proceeds in preference to the defe ant. But that was not done ; the plaint were paid off only to the extent of 2,200 of the whole amount of their decree, 7,011 rupees 12 annas and 5 pie, while defendant's entire decree was satisfied. T decree of the lower Court ordering the defen ant to pay over to the plaintiffs the balan of their decree is therefore correct. T appeal is accordingly dismissed with costs.

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The 20th March 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Decision on Title in Rent Court.

Case No. 1618 of 1875.

Special Appeal from a decision passed by the Officiating Additional Judge of the 24-Pergunnahs, dated the 1st May 1875, reversing a decision of the Third Moonsiff of Alipore, dated the 27th May 1874.

Ram Doss Nushkur and another (Plaintiffs), *Appellants,*

versus

Rash Monee Dossee (Defendant), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

No one for Respondent.

The old Privy Council and Full Bench Rulings, that a Revenue Court's decision on title in a rent-suit under Act X. of 1859 is not conclusive, went upon a Collector's incompetency to determine a question of title, but did not now apply to the decision of a competent Civil Court trying a rent-suit under the new law.

I THINK that the Judge is right.

It has been decided, no doubt, by the Privy Council and by a Full Bench of this Court (full notice of both judgments is to be found in 24 Weekly Reporter 154) that, under Act X. of 1859, a Revenue Court's decision on title in a suit for rent is not conclusive evidence; but the decisions in those cases went very much upon the incompetency of a Collector (who had only special jurisdiction to try summary suits) to finally determine questions of title.

In this case, however, the circumstances are different. The suit for rent was brought under the new Act, in the Court of the Moonsiff, and that officer, by special direction of the Judge of the district, fixed and tried the issue as to the title of the contending parties to the land of which rent was claimed. He decided that the plaintiff had failed to prove his title, and this I take to be the decision of a competent Court on the issue of title which must estop the plaintiff in this case from bringing a suit for possession. He can only recover possession by proving his title to the land, and this point has already been decided against him by the Civil Court in a case where the present special respondent was defendant.

The special appeal must be dismissed with costs.

The 20th March 1876.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Interest running on Bond-debt—Rate of Interest on expired Bond—Limitation.

Case No. 38 of 1875.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 19th September 1874.

Deen Dyal Lall (Plaintiff), *Appellant,*

versus

Choa Singh and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Nil Madhub Sen* for Appellant.

Baboos Mohesh Chunder Chowdhry and *Jogesh Chunder Dey* for Respondents.

Where a bond-debt is not discharged on the date on which it falls due, it does not require a special contract to make the interest run on from the above date to the period when the debt may be discharged; but it is within the discretion of the Court to decide the rate at which the interest for such further period shall run.

Where a whole property is mortgaged at one time, a Court cannot limit the lien to a fractional share of the property.

A suit to establish a right to sell mortgaged property in satisfaction of a mortgage-debt, is not barred by limitation.

Kemp, J.—THE plaintiff is the appellant in this case. He sued three sets of defendants to recover a sum of Rs. 8,088 8 annas 6 pie, due under a bond dated the 28th of Assin 1269 Fuslee, corresponding with the 17th of October 1861. The principal amount borrowed was Rs. 2,600, and interest is claimed from 28th Assin 1269, the date of the bond, to the 28th Bysack 1281, date of suit, being 12 years and 7 months, at the rate of Rs. 1-8 per mensem; the total amount of interest claimed being Rs. 5,488 8 annas 6 pie. The bond was admitted by the principal defendants, the judgment-debtors. They were examined, and they also stated that, after the bond fell due, they were unable to pay it, and that they agreed to go on paying

interest. The first defendants are the purchasers of a portion of the property which was mortgaged to the plaintiff as security for the sum advanced by him to the principal defendants. The Subordinate Judge has given the plaintiff a modified decree for a sum of Rs. 2,875 9 annas 6 pie out of Rs. 8,088 8 annas 6 pie claimed. He has also made the plaintiff pay the costs of the defendant, and the result of the suit is, that although the bond is admitted and the defendants depose that they were unable to pay, and asked for time and promised to pay interest, they have to pay only about one-third of the amount claimed; and that the plaintiff has only to receive Rs. 2 5 annas in the shape of costs from the defendants. No wonder that, under these circumstances, the respondents did not appeal to this Court.

The Subordinate Judge has found that, as there is no stipulation in the bond regarding payment of interest after the appointed period for the discharge of the debt, the plaintiff is not entitled to interest after the lapse of that period. He also holds that there is a 1-anna share which is still in the hands of the defendants, the debtors, which is to be sold first, and that if that is not sufficient to satisfy the plaintiff's claim as decreed, the rest of the property can be sold.

The objections taken before us by the appellants are: 1st, that the Court was wrong in not using its discretion in overlooking the evidence of the debtor-defendants, and in not awarding interest from the date upon which the bond fell due up to the date of suit, and also with reference to the order of the Subordinate Judge dividing the mortgage responsibility, and directing that the 1-anna share should be sold first. The purchaser-defendants raise the following objections: that interest after the due date is not a charge upon the property hypothecated, inasmuch as any interest after that date is in the nature of damages, and more than six years having elapsed from the date on which the principal fell due, namely, in May 1862, the suit is barred.

We think that e Subordinate Judge is clearly wrong in not awarding interest at all from the date on which the bond fell due. The execution of the bond is admitted, and the bond-debtors admit in their evidence that they were unable to pay the debt on the date it fell due, and that they promised to pay interest from time to time. There is a case reported in page 27, Volume VII., Law Reports, Appellate Series, English and Irish Appeals, before the House of Lords, the case of Cooke *vs.* Fowler, in which it ha held that there is no rule of law that contract for the payment of money on certain with interest at a fixed rate d that day a further contract for the co ance of the same rate of interest is implied. Lord Selbourne, in his judg which is to be found at page 37, "Although in cases of this class intere "the delay of payment *post diem* oug "be given, it is on the principle, "implied contract, but of damages for a b "of contract. The rate of interest to "the parties have agreed during the "of their contract may well be adopte "an ordinary case of this kind by a C "or Jury as the proper measure of dam "for the subsequent delay; but th "because, ordinarily, a reasonable and "rate of interest which it may be pres "would have been the same whatever "be the duration of the loan, has "agreed to. But in the case before "Lordships, the agreed rate of intere "excessive and extraordinary; and altho "no question is raised between the pre "parties as to its fairness and reasonable "so far as it was matter of express contr "it by no means follows that it would h "been fair and reasonable, or would ha "been so regarded by the borrower, if it h "been indefinitely extended to every possi "delay of payment after the stipulated time

Now, applying the principle thus laid do to the present case, we do not think should be justified in giving the plain interest from the date on which the bo fell due at the rate of 18 per cent. per annu the rate mentioned in the bond; but we thi that, acting upon the discretion vested in we ought to allow the plaintiff interest at t rate of 6 per cent. per annum (which is t rate usually allowed by this Court) fro the date on which the bond fell due. Th plaintiff will, therefore, be entitled to recov Rs. 2,600 principal, with interest at the ra of 18 per cent. per annum up to the date o which the bond fell due, and from that da at the rate of 6 per cent. per annum up t date of payment.

With reference to the second question, we think that the Subordinate Judge is clearly wrong in dividing the liability under the mortgage. The whole of the property was hypothecated to the plaintiff for the debt. This is admitted by the debtor-defendants, and it is also clear from the evidence that the sale of a portion of that property to the other defendants, the purchasers, was made

notice to the plaintiff. The Subor-Judge will, therefore, proceed to sell ole of the mortgaged property unless ount due to the plaintiff is paid up such sale. Then, with reference to jection taken by the purchaser-defend-s to limitation, we may observe that bordinate Judge has found, and we rightly found, that limitation does not his suit, inasmuch as the suit was ht to establish the right of the plaintiff the mortgaged property in satisfaction mortgage-debt, and the case which has quoted before us by the pleader for the aser-defendants is quite a different case the one now before us.

also think that the decision of the below with reference to costs must be fied.

, therefore, modify the decree of the t below with reference to our remarks above as to the interest payable to the tiff, and the period for which that est is to be paid; and, as regards costs, think that the plaintiff is entitled to his in this Court and in the Court below the sum now decreed as against both of defendants.

The 20th March 1876.

Present:

The Hon'ble W. F. McDonell, *Judge.*

Discrepancy in Location of Land.

Case No. 1567 of 1875.

cial Appeal from a decision passed y the First Subordinate Judge of Backergunge, dated the 5th May 1875, reversing a decision of the Moonsiff of Dakhin Shahabazpore, dated the 6th April 1874.

Arjan Bibee (Plaintiff), *Appellant,*

versus

oop Gazi Sirdar and others (Defendants), *Respondents.*

Baboo Bhoobun Mohun Dass for Appellant.

Baboos Kalee Mohun Dass and *Kashee Kant Sen* for Respondents.

In a suit for arrears of rent, in which the relationship of landlord and tenant was proved to exist, and the plaintiff's claim was otherwise established, that claim would not of necessity be destroyed by the discovery that the plaintiff's statement placed the land in suit in one chuck, whereas a previous decision (by which she was not bound) placed the said land in another chuck, though this discrepancy called for investigation.

THIS was a suit for arrears of rent.

The Moonsiff found that there was in reality no dispute as to the identity of the land; that the relationship of landlord and tenant existed between the parties; and that the defendants had paid rent to the plaintiff, and that the plaintiff was entitled to the rent sued for.

In appeal, the Subordinate Judge held that, as the lands were found to belong to Chur Luchmi, and were not the lands of Chur Kalma as described by the plaintiff, the plaintiff's suit must fail on this ground alone.

In special appeal, it is urged that the Judge is wrong in law in holding that the mere fact of the lands, the rent whereof is claimed in this suit being held to have belonged to a different mouzah by a decree in which the plaintiff was no party, would be a bar to her recovering a decree for arrears of rent.

Now, the simple fact that the lands were situated in Chur Luchmi, and not in Chur Kalma, would not of itself necessarily bar the plaintiff's claim. The suit being one for arrears of rent, and the defendants having denied that they ever were the plaintiff's tenants, the questions in this case were whether the relationship of landlord and tenant ever existed between the parties; whether the defendant ever paid rent to the plaintiff for the land in dispute; and, if so, whether the plaintiff is still entitled to claim the rent. This the Subordinate Judge could not decide without going into the case on the merits. It may be that the talookdar from whom the plaintiffs obtained their Ousut Neem Howalah were directed by decree of Court to pay their rents to the zemindar of Chur Luchmi and not to the zemindar of Chur Kalma, and that subsequently the talook was sold; but it would still be necessary to inquire whether the intermediate tenures were cancelled, more especially when the rent claimed by plaintiff was found by the Moonsiff to be in respect of a period prior to the date of the purchaser's taking possession.

The judgment of the Subordinate Judge is reversed, and the case is remanded to him for trial on the merits. The costs will follow the result.

The 20th March 1876.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Adoption—Ceremonies—Relinquishment of Right.

Case No. 314 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 28th September 1874.

Baboo Banee Pershad (Plaintiff), *Appellant,*

versus

Moonshee Syud Abdool Hye, Manager under the Court of Wards of the estate of Baboo Desputty Singh, minor, and others (Defendants), *Respondents.*

Mr. Kennedy and *Baboos Mohesh Chunder Chowdhry, Chunder Madhub Ghose,* and *Kalee Mohun Doss,* and *Moonshee Mahomed Yusuf* for Appellant.

The Advocate-General and *Mr. J. T. Woodroffe,* and *Baboo Unnoda Pershad Banerjee* and *Mr. L. Sandel* for Respondents.

A cousin and heir to an insane proprietor having been sued for the amount of a decree, and application having been made for execution against the estate of the said proprietor after his death, it was urged that the estate had become the property of a minor who had been adopted by the insane proprietor previously to his decease, and could not be held liable for the debts of the cousin and heir, who, moreover, had formally relinquished his right to it. The plaintiff's claim rested on the contention that the formalities required to validate an adoption had not been attended to in this case. This contention was met by the plea that the adoption was complete, but that even if it had not been so, a document declaring the deceased proprietor's desire to adopt the minor had the effect of a testament. HELD by the High Court that, though the intention of the deceased proprietor to adopt the minor was clear, that intention, even as expressed in the abovementioned document, which was not testamentary in character, did not amount to an adoption in the absence of the necessary formalities The estate was accordingly declared liable for the amount of the decree against the cousin and heir.

Kemp, J.—THIS suit was instituted on the 5th July 1872. The plaint alleges that the sum of Rs. 15,952-7 is due under a decree, dated the 29th February 1864, by the defendant, Rhit Bhunjun Singh, No. 3, and Baboo Goman Bhunjun Singh, deceased, the natural father of the minor, Baboo De Singh, who, it is alleged, has been ad by the late Baboo Bindesuree Singh.

It is stated that Baboo Bindesuree died on the 31st July 1871, and that his devolved under the provisions of the Hi law upon the defendant No. 3, Rhit Bh Singh, the judgment-debtor. That plaintiff, after attachment, applied for the of the property in suit, in satisfaction o decree. That the defendant No. 2, in co sion with the defendants Nos. 1 and 3, a view of saving the estate from lia for the debt, declared in a proceeding, under the provisions of Act XL. of 1 that the late Banee Pershad, a lunatic, adopted Desputty Singh, a minor, the so the late Goman Bhunjun Singh; that adoption was not sanctioned by the Rev Commissioner, the Sudder Board of Reve and the Government, such sanction b required under the provisions of section Act IV. of 1870 (B. C.). That the Z Judge, on the 28th March 1872, made order, declaring the adoption to be valid, struck off the file the application of plaintiff for the sale of the property dispute in satisfaction of the aforesaid de on the 20th June 1872. That the lun Banee Pershad, was under the Court Wards, within the meaning of Act XXX of 1858, and, under section 74 of that A he had no authority to adopt without pre ously obtaining the permission of the Beng Government; and further that the alleg adoption was not made with the due obser ance of the necessary and legal ceremoni in the absence of the minor and his mothe and without the sanction of his fathe Goman Bhunjun Singh, who had died seve years prior to the alleged adoption.

The defendant No. 1, the Manager und the Court of Wards, in his written statemen prayed that "the case might be tried wi reference to the facts on the record, and th the Court of Wards might not be charge with costs."

The defendant No. 2, Mussamut Doolhi Purbooraj Kooer, guardian of Baboo De putty Singh, a minor, applied to be permi ted to file a written statement, but this ap plication was rejected by the Subordinate Judge, Baboo Khetro Nath Goopto, on the 18th December 1872. On the 19th of December 1872, the case came on for trial before the said Subordinate Judge. He laid down one issue, *viz.*:—

Whether or not Desputty Singh was legally adopted by Bindesuree Pershad.

The Subordinate Judge found that it was admitted that the defendant No. 3, Rhit Bhunjun Singh, is the first-cousin of Baboo Bindesuree Pershad, deceased; consequently, unless the adoption is substantiated, Rhit Bhunjun Singh is undoubtedly the heir of Bindesuree Pershad. That as Bindesuree was a lunatic and a ward, and the minor, Desputty Singh, was not adopted with the consent of his Honor the Lieutenant-Governor of Bengal, such adoption is null and void *ab initio*. The plaintiff's suit was decreed, and the property in suit declared to be liable to be sold in satisfaction of the decree of the 29th February 1864 against Rhit Bhunjun. Defendants to pay costs.

The manager and the minor Desputty Singh, represented by his guardian Doolhin Purbooraj Kooer, appealed. Rhit Bhunjun Singh did not appeal.

The grounds of appeal were :—

1st.—That the Subordinate Judge did not exercise a proper discretion in refusing to allow the appellant, Doolhin Purbooraj Kooer, to file a written statement.

2nd.—That the plaintiff was not entitled to a decree, until he established that the adoption-deed, dated 27th July 1871, was invalid and inoperative.

3rd.—That the Subordinate Judge was in error in assuming that the late Bindesuree Pershad was a lunatic in the absence of sufficient evidence on that point.

4th.—That the Subordinate Judge was wrong in decreeing the plaintiff's claim without putting him to the proof of Rhit Bhunjun's title to the property in dispute.

5th.—That the Subordinate Judge, before applying the provisions of section 74, Act IV. of 1870 (B. C.), to the case, ought to have inquired whether the estate of Bindesuree Pershad was placed under the charge of the Court of Wards in accordance with the provisions of the law.

6th.—That conceding that the adoption of Desputty Singh is invalid under the provisions of section 74, the plaintiff's suit ought to have been dismissed, inasmuch as by the deed, dated the 27th July 1871, executed by the late Bindesuree Pershad, the property in dispute has devolved upon the minor Desputty Singh.

7th.—That Rhit Bhunjun Singh has, by his acts in connection with the execution of the aforesaid deed, waived and relinquished his rights, if any, to the property in dispute.

These were the material objections raised in appeal.

The appeal came on for hearing before Justices Phear and Morris on the 3rd of February 1874.

Those learned Judges held that the written statement of the manager, Abdool Hye, amounted to saying that the "Court below might do exactly what it liked with the case, provided the Court of Wards was not made responsible for costs." That no statement is on the record of the minor's case, and that, in so far as the learned Judges could see, there had been "in the matter of "the suit an entire assumption of the truth "of the plaintiff's case in its principal "particulars as against the infant defendant "without there having been any person "whatever before the Court who either "professed or was competent to bind the "infant in the matter." The decision of the Subordinate Judge was reversed, and the case remanded for re-trial. The defendant Doolhin Purbooraj Kooer to be permitted to file a written statement, and the Court was directed to frame and settle fresh issues between the parties, and proceed to the trial of the case. Costs of the appeal to abide the event.

After remand, the defendant Doolhin Purbooraj Kooer filed a written statement on the 15th June 1874, briefly to this effect :—

That the estate of Bindesuree Singh has not in any way devolved upon Rhit Bhunjun Singh. That Rhit Bhunjun Singh voluntarily admitted the adoption of the minor Desputty Singh before the Collector, signing his name on the deed, dated the 27th July 1871. That all the proceedings of the Collector, under the provisions of Act XXXV. of 1858, for placing the management of the estate of the late Bindesuree Pershad under the Court of Wards, were wholly invalid, and that the provisions of section 74, Act IV. of 1870, will not apply.

That the adoption is valid, the father in his lifetime having given his consent; that Bindesuree Pershad, while in a sound state of mind, observed those requirements of the Hindoo Law which are essential to the validity of the adoption.

That the deed of the 27th July 1871 operated, not only as a deed of adoption, but as a gift, whereby the minor has become the absolute proprietor of the estate of the late Bindesuree Pershad.

On the 28th September 1874, the suit was decided by another Subordinate Judge, Moulvie Mahomed Noorul Hossein. He found that the ceremonies requisite under the Hindoo Law for adoption were not

performed. That as Bindesuree Pershad had been found to be a lunatic by the Zillah Judge's proceedings, dated the 18th April 1865, which were confirmed by the High Court on appeal on the 28th November 1865, any adoption made by him without the sanction of the Lieutenant-Governor of Bengal is invalid.

That, in the opinion of the Subordinate Judge, the deed of the 27th July 1871 is not a will, and nothing else but a deed of adoption.

That Rhit Bhunjun Singh, who, the adoption being invalid, is the heir of the late Bindesuree Pershad, has abandoned the right belonging to him, and admitted the validity of the adoption, which relinquishment was made without intent to defraud his creditors.

That whatever legal defects may have crept in in effecting the validity of the adoption have been cured by the acknowledgment of the party who would be heir to the estate but for the adoption. The plaintiff's suit was dismissed with costs.

The plaintiff appeals on the following grounds :—

1st.—That as the Subordinate Judge has found that the adoption is invalid, and that Rhit Bhunjun Singh is the heir of the late Bindesuree Pershad, he ought, consistently with this finding, to have decreed the plaintiff's suit.

2nd.—That the Subordinate Judge has misconceived the legal effect of the alleged acts of Rhit Bhunjun Singh in the matter of the relinquishment of his rights.

3rd.—That, according to law, there can be no relinquishment of inheritance in favour of a person who is not legally entitled to succeed in default of the relinquishing party.

4th.—That the property having, on the death of Bindesuree Pershad, lawfully vested in Rhit Bhunjun Singh, his heir under the Hindoo Law, the same could not pass from him to Desputty Singh without a valid transfer by him of his right in favour of Desputty Singh, and the appellant, as the creditor, is entitled to sell the property in execution of his decree.

5th.—That the alleged acceptance of the adoption by Rhit Bhunjun was made simply with a view to defraud his creditors.

6th.—The alleged acceptance is inadmissible as evidence as, though alleged to have been reduced to writing, it has not been registered.

7th.—That the alleged adoption is i[illegible] under the Hindoo Law.

8th.—That, in the absence of any [illegible] evidence, the Subordinate Judge is in[illegible] in assuming on conjectural grounds th[illegible] alleged adoption was made with the pe[illegible] sion of Goman Bhunjun or his widow.

There is a cross-appeal on the part of [illegible] defendant, respondent, to the effect—

1st.—That the adoption is valid accor[illegible] to the Hindoo Law.

2nd.—That the estate of the late [illegible] desuree Pershad could not legally be pl[illegible] under the Court of Wards.

3rd.—That the sanction of the Lieuten[illegible] Governor to the adoption was not necess[illegible]

4th.—That the Subordinate Judge is [illegible] error in holding that the deed, dated the [illegible] July 1871, does not operate as a will.

The main points for decision are, [illegible] is the alleged adoption of Desputty S[illegible] valid, for, if so, the learned Counsel, [illegible] Kennedy, who appears for the appell[illegible] admits that his client has no case. Se[illegible] if not valid, then as an alternative p[illegible] whether the deed, dated 27th July 18[illegible] operates as a will. The questions as [illegible] whether the sanction of the Lieuten[illegible] Governor to the adoption was necess[illegible] whether the estate of the lunatic was leg[illegible] taken charge of by the Court of Wards, and [illegible] effect of the relinquishment by Rhit Bhunj[illegible] are subordinate questions. The adoption [illegible] Desputty Singh, the fourth and youngest [illegible] of the late Goman Bhunjun Singh, is alleg[illegible] to have been made by the late Bindesu[illegible] Singh, in virtue of a deed, dated the 27[illegible] July 1871, page 88 of the printed bo[illegible] It is further alleged that the natural fat[illegible] of the boy in his lifetime gave his cons[illegible] to the adoption, which consent was approv[illegible] of by Asman Kooer, the mother of the bo[illegible] who has been examined in this case. P[illegible] 119 of the printed book.

The deed of the 27th July 1871 is to th[illegible] effect. I translate from the vernacular :—

"The writing of Baboo Bindesuree Pe[illegible]
"shad Singh, proprietor of Mouzah Delawa[illegible]
"&c.: 'I, subject to the sanction of th[illegible]
"Collector Saheb Bahadoor and of th[illegible]
"Commissioner Saheb Bahadoor and of th[illegible]
"gentlemen of the Sudder Board, have
"taken in adoption Baboo Desputty Singh
"*alias* Lalajee, the fourth son of Baboo
"Goman Bhunjun Singh; that I have made
"him the 16-anna proprietor of all my estate
"and property and wealth, that is to say, of

"all that belongs to me; and this child, remaining with me at Arrah, shall be taught "to read and write.

"'25th Srabun 1278 (corresponding with "the 27th July 1871.)

"'Signed, Baboo Bindesuree Pershad Singh, "with my own hand. This letter of taking "in adoption which has been written is "correct.

"'Writer, Seo Churn Lall. I, by order of "Baboo Bindesuree Pershad Singh, have "written this letter with my own hand.'"

It is contended by Mr. Kennedy for the appellant, plaintiff, that this document is nothing more than a deed, signifying that the intention of the party executing it was, if certain approval was obtained, to take in adoption Baboo Desputty Singh, and that, as the boy was not given or accepted, and no ceremonies of any kind were performed by the adopting father, the adoption is invalid. On the other hand, it is contended by the Advocate-General, Mr. Paul, and Mr. Woodroffe for the respondents, that the deed is one of adoption as well as a testamentary disposition of the estate of Banee Pershad Singh, and that all the ceremonies necessary for the validity of the adoption were observed.

It appears clear that Baboo Bindesuree Pershad Singh, if not insane, was a man of weak intellect. The learned Advocate-General, in the course of his argument, admitted that Baboo Bindesuree Pershad was incapable of managing his affairs within the meaning of Act XXXV. of 1858; but alleged that his estate was under the management of the Collector, not as representing the Court of Wards, inasmuch as the estate, not being an entire estate, could not legally come under the surveillance of that Court, but could only be assumed by the Collector as managing the estate of a disqualified proprietor. The learned Counsel, Mr. Kennedy, for the appellant, also admitted that much lower capacity would be sufficient for the purposes of an adoption, which to a Hindoo is almost a religious ceremony of necessity than for a will; but he contends that the evidence shows that Bindesuree was of too weak an intellect to exercise testamentary capacity, even admitting, which the learned Counsel does not, that the deed could be considered as testamentary.

It appears to me clear that it was the cherished desire of the late Baboo Bindesuree Pershad Singh either to have male issue or to adopt. During his lifetime he tried to induce the authorities to permit him to marry again, his first wife being dead, but without success. At page 88 of the printed book will be found copy of a statement made by the aforesaid Baboo in the presence of Mr. D'Oyly, the then Collector, and of Dr. Thornton, the Civil Surgeon of Arrah, in which town the Baboo resided. This statement is to the effect that it was his earnest wish to adopt a son; that he had thought over this for a long time; that he wished to adopt the youngest son of Goman Bhunjun Singh by name Lalajee; that he wished the boy to live with him. Then he gives his reasons for selecting the youngest, because the two eldest would inherit their paternal estate; and, lastly, that, owing to the tender age of the boy selected (4 or 5 years), he would more readily recognize his adopting father.

At page 103 will be found copy of the evidence of Mr. D'Oyly, who deposes to the execution of the deed of the 27th July 1871 in his presence by Bindesuree Pershad Singh. That Bindesuree gave his reasons in full for the selection of the boy, *viz.*, that he had no heir; that he had applied repeatedly without effect for permission to marry; that he was very lonely and wanted somebody to live with him; that it was not the custom to select the eldest son; that the third son had already been adopted by another party; and that, on the whole, the fourth and youngest son was the best selection he could make. Dr. Thornton's evidence corroborates this. I am, therefore, clearly of opinion that the late Bindesuree Pershad Singh executed the deed of the 27th July 1871, and that it was his desire and intention to adopt Desputty Singh, the fourth and youngest son of the late Goman Bhunjun Singh. The selection, I may observe, was an unobjectionable one, as Desputty was the son of the cousin of Bindesuree Pershad Singh. I proceed to consider whether at the time this deed was executed the boy had been given by his natural parents, and accepted by Bindesuree Pershad Singh; and on this part of the case I am clearly of opinion that there was no gift or acceptance. I have already referred to the statement of the late Bindesuree Pershad Singh, page 88, which is contemporaneous with the deed, in which it is recited that the adoption had been made. In the statement which has been proved by the evidence of Mr. D'Oyly and Dr. Thornton, two independent and reliable witnesses, all the recitals are wholly inconsistent with a previous giving and taking. Mr. D'Oyly, at page 104, deposes that he does not know whether the mother of the boy ever came to

Arrah or not, or whether any attempt was made to obtain her consent; that such consent was not given to Mr. D'Oyly in his capacity of Collector until after the death of Bindesuree Pershad Singh; that he, Mr. D'Oyly, did not ask Bindesuree Pershad Singh, nor was the question mooted, whether the Baboo had got the consent of the guardian of the boy.

The main evidence as to the boy having been verbally given by his natural father, Goman Bhunjun, and accepted by Bindesuree, is to be found at page 119 of the printed book, *viz.*, that of Asman Kooer, the widow of Goman Bhunjun Singh. The first part of her evidence as to an alleged conversation between her late husband and the late Bindesuree Pershad is hearsay. The letter which she alludes to has not been produced, and her statement, that her husband, during his lifetime, gave the boy, and that he was accepted when he was eight or nine months old, is utterly inconsistent with Bindesuree's subsequent attempt to marry, and with the statement of the alleged adopting father in 1871 when the boy was eight or nine years old, that he was then desirous to select the fourth son of Goman Bhunjun Singh for the purpose of adopting him. Further, I find that this lady, Mussamut Asman Kooer, in her deposition (copy of which is to be found at pages 26 and 27 of the printed book) stated that she had not received instructions from her husband regarding the adoption of any other son, whereas it is admitted that one of the sons has been adopted by Asu Bhunjun, the brother of this lady's husband. At pages 52 and 53, Sheo Churn Lall, the writer of the deed of adoption and the mookhtear of Banee Pershad Singh, states that he cannot say whether his employer had asked for the boy or whether his natural parents consented.

I now come to the question of whether any ceremonies were performed, and on this part of the case I have no doubt whatever. In my opinion, the boy was never taken to Arrah, the residence of his alleged adopting father, nor were any ceremonies performed. For reasons which I shall give, I am clearly of opinion that it was the desire of the late Bindesuree Pershad Singh to adopt the son of Goman Bhunjun; that he executed a deed, dated 27th July 1871, signifying such intention, but that the matter fell through, owing to the death of Bindesuree Pershad Singh within a very few days, not more than four days, after the execution of the deed, which was executed in anticipation of the sanction to the proposed adoption of the Lieutenant-Governor of Bengal. The main evide to the taking of the boy to Arrah, th dence of the alleged adopting father, w found at page 113 of the printed Salik Singh, who describes himself servant of the late Goman Bhunjun S father of the boy, says he has no salary, but that, whenever he requires it, gets 100 or 50 rupees." He starts saying that three or four years ago (he examined in 1874) Bindesuree Pe adopted Desputty Singh, the youngest s Goman Bhunjun Singh; that the widow, w out any apparent reason beyond the asse that Bindesuree was ill, sent him witness) to Arrah; that Bindesuree "You know that your master Goman B jun has given me his youngest son to ado Why, unless there was some doubt abou consent of Goman Bhunjun, should this st ment have been made? "Go and fetch boy immediately." The witness says mother of the boy expressed her satisfac and sent the boy. The witness then cribes the journey to Arrah, the arrival th and the performance of certain ceremo by Gunput Misser, not the family Puro but an outsider called in. because the ado ing father was seriously ill, and delay was be avoided. This witness admits that no of the relatives of the family were pres that no Brahmins were present, t nobody was fed, although the Purohit for nonce said they ought to be fed. *That* manager under the Court of Wards, and t is important, to the knowledge of witness, had no notice of the performan of the ceremonies; and, lastly, that the Puro received only 1 rupee 4 annas for services.

The witness, Bungee Kant, pages 115 a 116, who is a salaried servant of Gom Bhunjun Singh, states that, in the month Srabun (he cannot recollect the year) Bab Bindesuree Pershad adopted the fourth s of his (the witness's) master. That he told that Salik Singh had come to take t boy, and was directed to go with the This witness says the Purohit Gunp Misser went with the party from Dulibpo to Arrah, which is contradicted by the ev dence of Gunput Singh. When this w stated, the pleader for the defendants declined to examine this witness further, stating that he was colluding with the plaintiff.

Then we have the evidence of the *quasi* Purohit, Gunput Singh. He is not the family Purohit. Lakeram Misser *is the* family Purohit, but it is said that the case

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an emergent one, that the adopter was usly ill, and was obliged to avail himself e service of the first Purohit available. re may be something in this, but on idering the evidence of Gunput, I con- it to be wholly untrustworthy. Turn- o page 111 of the printed book, I find this witness says that, in Srabun (he ot remember the year), he came to Arrah e Bindesuree Pershad, because he heard as ill. The witness then describes how oy was brought by Salik Singh, and the monies which were then and there ormed, that is to say, late in the evening he day on which the boy arrived at h. This Purohit states that, according e Hindoo Law, he performed the cere- ies according to the principles of the tras, admits that he had never before ormed the ceremonies connected with an tion, admits that the relatives, "brethren" e family, ought to be present, but were present, is unable to remember what are welve kinds of sons who can be adopted r the Hindoo Law, and that he received of 1 rupee 4 annas.

now come to the question whether the of the 27th July 1871 operates as a I am clearly of opinion that the deed uestion is not a will. It seems to me ecessary to discuss the question whether, ing to the acts of Bindesuree Pershad h, I can say that they implied a dispos- mind, that he understood the nature of property, the use and benefits arising it, and that he had the sense and discre- to select a person or persons to enjoy his erty after his death. If it were neces- to decide this question, I should with- hesitation say that the very best evidence ld be required, looking to the admitted ecility of intellect of the aforesaid Baboo, rder to establish a capacity on his part ake a testamentary disposition. I do not n to say that a perfectly balanced mind equired, nor do I lay much stress on the that because the Baboo indulged his ours in unaccustomed ways that he was efore of unsound mind; but I can have esitation on the evidence before me in ding that he had not sufficient capacity nderstand the nature and character of his supposing the document in question to a will. That it is not a will seems to me ar. Looking to his intentions, an import- element, I find from his statement at page hat he wished to adopt—a wish natural Hindoo. In the document, at page 89, recited that he wishes the boy to reside with him, the party executing the document, at Arrah; this is not a testamentary declaration; and then, when he signs the document, he treats it simply as a letter of adoption. It seems to me that the defendants being conscious of the weakness of their case have fallen back upon this alternative plea of a will.

Then, as to the effect of the alleged relinquishment by Rhit Bhunjun Singh, it is true that he admits in his evidence, pages 95 and 121, that he wrote that "he agreed and consented to the adoption" with his own hand; but he also states, page 96, "I never "had the slightest expectation of ever obtain- "ing this property of Bindesuree's. I did "not apply for a certificate on Bindesuree's "death, as I considered the adoption all right "and valid; when the application for consent "was sent to the Board and returned, I then "made my application. If the Government "does sanction the adoption, I would not "apply for this certificate of course."

No admission of Rhit Bhunjun, with reference to the adoption, can make the adoption valid.

I would reverse the decision of the Subordinate Judge, and decree the plaintiff's suit and appeal with costs.

Pontifex, J.—I quite agree in the judgment of Mr. Justice Kemp. I shall however add a few observations on the case.

In my opinion, we must consider that the deceased Bindesuree and his estates had been properly placed under the management of the Court of Wards. The deceased's father had been a lunatic. On his death, the deceased's younger brother had taken on himself the entire management of the property, and on the death of the brother the Government pleader, by petition, dated the 19th February 1864, prayed that "the mehals" of the idiot be brought under the management of the Court of Wards.

If the deceased Bindesuree had been entitled, as is contended by the respondents, to joint property only, he could not have been placed under the care of the Court of Wards. But we find, on the 14th of March 1864, an order as follows: "That to-morrow the Mohafiz do submit a kyfeut whether the properties of Bindesuree and Mohabir (the deceased's brother) were joint or the entire mehal." On the 15th March a kyfeut was filed accordingly, and, on the same day, a perwanna was issued to the Government pleader, directing him to take the necessary proceedings. On the 18th April 1865, Mr. Tucker, the Judge of Shahabad, made

an order, which commenced as follows: "An application has been made by the "Collector of Shahabad, on the part of "Government, representing that Baboo "Bindesuree Pershad is of unsound mind "and incapable of managing his affairs, *and* "*praying that his property be taken* "*under the Court of Wards.*" The order concluded by directing that Bindesuree's estate be placed *under the Court of Wards.*

It appears from these proceedings that proper care was taken to inquire whether Bindesuree had separate estate of a nature to render it proper that he and it should be placed under the management of the Court of Wards, and I think that, unless the contrary is shown, we must consider that he was properly placed under the management of the Court of Wards. It is not sufficient in my opinion to show that he was possessed of some joint estate.

Without giving any opinion whether the absence of the consent mentioned in section 74 of Act XXXV. of 1858 would invalidate an adoption in other respects valid and complete (which seems at least doubtful, see 9 Moore's Indian Appeals, page 294, and the observations by the Judicial Committee on the same case, page 299, leaving the validity of any further adoption under the power for future trial), I think it clear upon the evidence that the document of the 27th July 1871 was intended to be acted upon only if the consent was obtained. Upon that understanding, the Collector Mr. D'Oyly appointed a future day for the ceremonies, and applied for the consent. Mr. D'Oyly says in his deposition (an attested copy of which has been filed): "After the deed was executed "(27th July, Thursday), I directed the "manager to see that all the usual and "necessary ceremonies were performed, and "first of all Monday was fixed on as the "day on which all the relatives were to be "collected together. And afterwards I "considered it advisable to await reply to "the official report I had made to the Com-"missioner, and before receipt of such reply "the ward died, and it was simply conse-"quent on the ward's death the matter was "stopped." Afterwards he says: "I do not "know if any attempt was made to obtain "the previous consent of the mother or not. "I do not know if any ceremonies or not "took place relative to the adoption beyond "the ward's declaration that he had adopted "the boy mentioned in the adoption-deed. "I sanctioned no expenses on account of the "adoption." And further on: "The con-"sent of Asman Kooer (the boy's "was given in by petition after the "of the ward."

I gather from this that the inte the parties on the 27th of July was ceremonies, &c., should not be perf earlier than Monday, the 31st of July Mr. D'Oyly deposes to the fact that suree died three or four days after the July. I do not believe the evidence the boy was brought over in the in from his mother. I do not believe evidence about any ceremonies taken place, and it is clear that no rel were summoned, and that no notice given to Mr. D'Oyly or the manager Court of Wards. It may be that an tion in this family might have been without any ceremonies, and we hav evidence as to Bindesuree's caste, think it clear upon the evidence that the intention of all parties that cerem should be performed, and that the rela should be summoned. According to evidence of Salegram Singh, Binde said to him: "The Collector has appo a date, and he will supply the expenses, I will find the brethren."

I am of opinion, therefore, that there in fact no adoption, although Bindesuree exceedingly anxious to adopt, and was bably of sufficient capacity to adopt. much as adoption is a religious and ne sary act.

With respect to the respondent's alte tive argument that the instrument of 27th of July may be treated as testamen and in the nature of a will, I think even if it could be so treated, the evid shows that Bindesuree had not suffi testamentary capacity. But I am of opi that the instrument was never intended and ought not to be, treated as a will. document was provisional, and was inten to be acted upon during Bindesuree's And the words which are relied upon words of gift are to my mind merely d criptive of the result of the intend adoption. And, if there was in fact adoption, no approval by Rhit Bhunjun, eit before or after Bindesuree's death, co affect his estate. And indeed, according Mr. D'Oyly's attestation, such approval given to an adoption, subject to the sanctio of the Lieutenant-Governor being obtained which never was obtained.

The 20th March 1876.

Present:

Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Inheritance—Primogeniture.

Case No. 1083 of 1875.

l Appeal from a decision passed by Officiating Judge of Cuttack, dated 9th April 1875, affirming a decision the Subordinate Judge of that District, d the 31st March 1874.

rza Mahomed Akul Beg (one of the Defendants), *Appellant,*

versus

Mahomed Koyum Beg and another laintiffs) and others (Defendants), *Rendents.*

J. T. Woodroffe and *Baboos Unnoda ershad Banerjee, Mohesh Chunder howdhry,* and *Mohendro Lall Mitter* Appellant.

oos Sreenath Doss, Obhoy Churn Bose, d *Amarendro Nath Chatterjee* for espondents.

here a suit was brought by two younger brothers, cordance with Mahomedan Law, for their shares in perty which was held by an elder brother, and had been held by a succession of elder brothers long course of years, two of the members having mer trials had their right to exclusive inheritance id by formal decisions, HELD by the High Court in the absence of any sunnuds declaring contrary, the practice of succession by primogeni- must be accepted as prevailing on the estate.

Markby, J.—THE plaintiffs, who are re- ndents in this appeal, sued as heirs, under general Mahomedan Law, to recover from ir brother, the appellant, their share of property left by their father. The operty, in dispute, is landed property, situate the District of Cuttack, which was origi- lly granted to Mirza Mahomed Saleh, the mmon ancestor of the parties, about two ndred years ago, by the then reigning Mogul Emperor. From the original grantee, it passed to his eldest son Afzool, and, he being childless, to his brother Shere Mirza. The latter appears to have been succeeded by his second son Buroollah about the year 1710, but, from that time until the present, the property has passed regularly from eldest son to eldest son down to the father of the present litigants who obtained possession about the year 1826. The only question raised in the case is whether on his death the property descends entire to the appellant as eldest son, or is divisible amongst the parties according to the general Mahomedan Law.

The very same question was raised in the year 1826, when Hyder, the grandfather of the present litigants, was in sole possession. Other members of the family then claimed shares, but their claim was dismissed by the Judge of Cuttack, and his decision was affirmed by the Commissioner.

The matter then rested until 1852. In the meantime Goolzad, the eldest son of Hyder, had succeeded to the property. In that year, Dildahar, his next brother, presented a petition, alleging that he was entitled to a share in the property, and asking to be allowed to sue *in formâ pauperis;* but this application was refused, and no further steps were then taken. Dhara, another brother of Goolzad, however, subsequently brought a suit in the Moonsiff's Court, to recover his share, which suit was dismissed in 1862. Goolzad died, and the present appellant succeeded in the year 1872, and upon an application to the Collector for mutation of names, Yassin, one of the present respondents, put in a petition, acknowledging the appellant's right as eldest son to the entire property.

Notwithstanding these facts, both the Courts below have held that the property is divisible according to the ordinary rules of inheritance under the Mahomedan Law.

We are unable to agree in this conclusion. In the litigation of 1826, the Judge of Cuttack and the Commissioner, with the original sunnuds before them, held that the property did not descend according to the general rules of inheritance, but according to the rules of primogeniture. That decision had been twice since disputed and twice affirmed, and it would be a very strange thing indeed now to hold that all these decisions were wrong; especially when not a single sunnud is now produced, so as to enable us to see what the terms of the grant really were.

It is said that the Judge of Cuttack, whose judgment was affirmed by the Commissioner, did not hold that the property descended according to the law of primogeniture, but only that the reigning power had, by successive grants, chosen to confer the property afresh on several successive members of the family to the exclusion of the rest, choosing the eldest son for his fitness and ability. But we do not put that construction on the judgment, for it must be remembered that neither Hyder, who was then in possession, nor his father, nor his uncle, who had preceded him, had any sunnud. None at least was produced or mentioned, and, therefore, upon that view, Hyder Ali had no title to the property at all, which was clearly not the opinion of the Judge. No doubt the Judge refers to the fitness and ability of the eldest son, but as we think only as the ground why the ordinary rules of succession were departed from. We consider that the Judge of Cuttack, by the decision of 1826, intended to hold that, under the sunnuds, the property was made descendible to the eldest son entire.

It has been also contended that this exceptional course of succession, even if it ever existed, was abolished by Regulation XI. of 1793, made applicable to Cuttack by Regulation XII. of 1805. But we think that the first proviso of section 36 excludes that contention. By that section, the general Regulations, so far as they are not superseded by the provisions of that Regulation, are made applicable to Cuttack: "Provided, however, that nothing herein "contained shall be construed to authorize "the division of the lands comprised in any "estates in the Zillah of Cuttack, in which "the succession to the entire estate devolves "according to established usage to a single "heir."

We see no ground for holding, as contended for the respondents, that this proviso is applicable to those districts only which are mentioned in the schedule at the close of the section. The schedule, in our opinion, only refers to the exemption contained in the second proviso, and we may observe that, not long after the passing of the Regulation, the Judge of Cuttack and the Commissioner put the same construction upon this section.

In our opinion, therefore, the decision of both the Courts below ought to be reversed, and the suit dismissed with costs in all the Courts.

The 21st March 1876.

Present:

The Hon'ble F. A. Glover and Rom Chunder Mitter, *Judges.*

Tullubi-Brahmootur—Permanent Interme Tenure—Notice of Enhancement.

Case No. 149 of 1875.

Special Appeal from a decision passed the Judicial Commissioner of C Nagpore, dated the 21st November 1 affirming a decision of the Assis Commissioner of Manbhoom, dated 26th August 1874.

Rajah Nil Monee Singh Deo Bahado (Plaintiff), *Appellant,*

versus

Chunder Kant Banerjee (Defendant), *Respondent.*

The Advocate-General and *Mr. J. Woodroffe* and *Baboos Umbica Ch Bose* and *Oopendro Chunder Bose* Appellant.

Baboo Chunder Madhub Ghose for Respondent.

A tullubi-brahmootur is a permanent interme tenure, entitling the holder to a notice under Regul VIII. of 1793.

Glover, J.—We cannot go behind order of remand made by this Court on 15th of January 1874. The case was sent back to the Assistant Commissioner "have it distinctly tried what is the na "of the defendant's tenure. On the find "on that issue will depend whether or "the plaintiff is entitled to recover in "suit on the notices which he has alre "served."

Both lower Courts have now found th the defendant's tenure is a "tullub brahmootur" one, held as such from the tim of the perpetual settlement, and therefo such an intermediate tenure as entitles th holder to a notice under section 51, Regula tion VIII. of 1793.

The grounds of special appeal are, that the Judicial Commissioner has taken no notice of a quantity of documentary evidence to show that the rent of the holding has varied since the perpetual settlement, and that the tenure itself, as found by the Court below, is not of a kind which would entitle the owner to notice under the Regulation of 1793.

With regard to the first objection, we remark that the Judicial Commissioner states distinctly in his judgment that he has "very fully considered all the evidence adduced on both sides;" and, moreover, the documents, which it is now said that the Judicial Commissioner did not consider, do not, in any way, assist the appellant's case. The pottah of 1206, which is the document chiefly relied on, does not show that the tenure was created since the settlement; quite the contrary, the holding is described in it as an old one, "gozashta jumma;" the utmost the pottah could prove is that the rent had varied, but this would not show that the tenure did not come under the Regulation.

There is undoubtedly evidence on the record showing that, at the time of the decennial settlement, the defendant's holding was entered in the records as a tullub-i-brahmootur one, paying a quit-rent of sicca rupees 182-9, and that the Judicial Commissioner has found that this was the nature of the holding.

In Rajah Nil Monee Singh *vs.* Chunder Kant Banerjee, 14 Weekly Reporter 251, a case almost precisely similar to this, and between the same parties, it was held that a tullub-i-brahmootur tenure was one that entitled the owner to notice under Regulation VIII. of 1793. And in Rajah Nil Monee Singh *vs.* Ram Chuckerbutty, 21 Weekly Reporter 439, the result was much the same. It was held in that case, that the defendant's tenure being found to represent a permanent transferable interest in the land, intermediate between the proprietor of the estate and the ryots, came under the provision of the Regulation, and gave its owner the right to notice under the law of 1793. In that case also the plaintiff was the same person as the plaintiff in this case, and the defendant set up the same defence as that made in the present suit. This suit has, moreover, been twice remanded, so that it is hardly possible to conceive a case in which the plaintiff had a better opportunity to ascertain what his rights were, and to bring them forward in a proper and legal manner.

It argued that the evidence on which the Judicial Commissioner has relied, does not prove that the defendant is an intermediate holder. This was a question of fact with which the Court below had exclusive power to deal, and it has not been, in any way, shown us that the finding was come to upon no evidence. It cannot indeed be said so in the face of the entry of this holding as a tullub-i-brahmootur one in the settlement-papers of 1790. It may be that the defendant has cultivated, or does cultivate, some part of the holding himself, but this would not deprive him of his position as the holder of an intermediate tenure.

We think that the Judicial Commissioner has found upon sufficient legal evidence that the defendant holds an intermediate tenure, and upon this finding, as laid down in the remand order of 1874, depended the question whether the plaintiff was entitled to sue for enhanced rent under the notices he had already served.

The special appeal is dismissed with costs.

The 21st March 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Eviction—Ejectment—Right of Occupancy.

Case No. 2047 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 29th May 1874, reversing a decision of the Moonsiff of Begooserai, dated the 21st November 1873.

Chowdhry Izharool Huq (Defendant), *Appellant,*

versus

Bhoosee Mahtoon (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Moonshee Serajul Islam* for Appellant.

Mr. M. L. Sandel and *Baboo Mohesh Chunder Chowdhry* for Respondent.

If a tenant holds his land for a term of years, and no new tenancy is created by the zemindar on the termi-

nation of the original lease, either by receipt of rent or in any other way, and if the tenant has no other title to the land beyond that conceded in the original lease for a term of years, the zemindar is entitled to evict the tenant on the expiration of the lease without the intervention of a Court:

At the birth of a right of occupancy the above points should be enquired into.

Milter, J.—This was a suit to recover possession of a piece of land on the allegation that the plaintiff had acquired a right of occupancy therein and that he was ejected on the 1st of Assar 1279 by the defendant zemindar.

The defendant denied that the plaintiff had acquired a right of occupancy, and alleged that it was held under a temporary lease extending from 1273 to 1279 F. S., and that, on the expiration of the term of this lease he having demanded a higher rent, the plaintiff relinquished the land.

The Moonsiff found that the plaintiff's allegation as to his having a right of occupancy was not made out: and that, on the other hand, the allegations upon which the defence rested, were substantiated. Upon that the Moonsiff dismissed the suit.

On appeal the Subordinate Judge, finding that the defendant failed to establish that the plaintiff relinquished the land, held, without trying the other disputed questions of fact arising in the case, that the plaintiff was entitled to a decree at once. He says: "Admitting that the plaintiff's lease was for a term of years, and that it has been brought to a close, still the landlord could not eject the plaintiff without the intervention of the Court. It is immaterial, therefore, for the purposes of this suit, to enquire whether or no the plaintiff has a possessory right."

We do not think that the Subordinate Judge is right in his view of the law. If the plaintiff held for a term of years, and if any new tenancy to the land had not been created by the zemindar after the termination of the term of the lease either by receipt of rent or otherwise, and, besides the grant for a term of years, if he has no other title to the land, it is evident that, on the expiration of the term of the grant, the zemindar would be entitled to evict him. The Subordinate Judge has, therefore, decreed the plaintiff's claim without determining all the questions of fact which arise between the parties. We, therefore, remand this case to him for re-trial.

Costs will abide the result.

Glover, J.—I concur.

The 22nd March 1876.

Present:

The Hon'ble F. B. Kemp and E. G. [illegible]
Judges.

Inheritance—Ancestral Property—Mi[illegible] Liabilities—Execution of Decree.

Case No. 306 of 1875.

Miscellaneous Appeal from an order [illegible] by the Officiating Judge of Gya, [illegible] the 22nd June 1875.

Mussamut Omuthoonnissa (Decree-ho[illegible]
Appellant,

versus

Puresmun Narain Singh (Judgment-deb[illegible]
Respondent.

Mr. Ameer Ali and *Baboo Hem Chu[illegible] Banerjee* for Appellant.

Baboos Kalee Mohun Doss and *Joge[illegible] Chunder Dey* for Respondent.

The freedom of a son from obligation to pay a dec[illegible] father's debts has respect to the nature of the deb[illegible] not to the nature of the property inherited by son [illegible] father; and where the debt is not of an immoral ki[illegible] judgment-creditor of deceased father can pr[illegible] against the inherited property in execution of decre[illegible] follow any assets which can be traced to the son's h[illegible]

Kemp, J.—We think that the decisio[illegible] the Judge in this case is clearly wrong [illegible] law on both points. The decree-holder [illegible] the appellant before us. She obtained [illegible] decree against Poorsudh Narain Si[illegible] Poorsudh Narain Singh appears to have d[illegible] in Assin 1279 Fuslee, leaving a minor [illegible] Juggernath Singh and a widow Mussa[illegible] Chundela. The decree-holder sued [illegible] minor represented by a near relation—na[illegible]ly, the nephew of the judgment-debtor—a[illegible] she also sues the widow. In the decr[illegible] Puresmun Narain, the guardian of th[illegible] minor, was absolved from all personal liabi[illegible]lity, and the decree-holder was directed to [illegible] realize the amount due by the sale of whatever assets of the judgment-debtor's there might be in the hands of Juggernath Singh.

Upon this the appellant applied to execute her decree. The Judge has held that, under the Mitakshara law, she is not entitled to execute her decree; and also that she cannot follow the assets, amounting to Rs. 2,000, which the guardian of the minor admits are in the hands of the minor Juggernath Singh as assets received by him from his father, the judgment-debtor. The Judge has quoted several decisions in the course of his judgment, and he winds up his decision by saying that the decree-holder's prayer on each of these grounds, namely, the prayer to sell the rights and interest, not, as the Judge supposes, of the minor, but of the father, the judgment-debtor; and also on the 2nd ground, namely, her application to proceed under section 203 of the Code as against the assets of the judgment-debtor which had come into the hands of the minor, and which he has not duly accounted for—cannot succeed under the Mitakshara law. The decision of the Privy Council in the case of Girdharee Lall *vs.* Kantoo Lall and others, which is the ruling case now, has laid down that "it is important to consider what the interest of the "son is that he acquired, and whether he "gained such an interest in the property as "prevented it from being liable to pay a debt "which his father had contracted;" and in answer to that question their Lordships observed: "If his father had died, and had "left him as his heir, and the property had "come into his hands, could he have said "that, because this was ancestral property "which descended to his father from his "grandfather, it was not liable at all to pay "his father's debts." Then they go on to say that, "unless the debt was of such a nature "that it was not the duty of the son to pay "it, the discharge of it, even though it "affected ancestral estate, would still be an "act of pious duty in the son. By the "Hindoo law, the freedom of the son from "the obligation to discharge the father's debt "has respect to the nature of the debt, and "not to the nature of the estate, whether "ancestral or acquired by the creator of the "debt." Therefore, in this case there being no allegation that the debt was incurred for immoral purposes, the rights and interests of the father in the estate can clearly be sold in execution of the decree, and the decree-holder is also entitled to follow the assets into the hands of the minor, Juggernath Singh, his guardian having admitted that he is in possession of assets belonging to the father. The judgment of the Judge is reversed, and this appeal decreed with costs.

The 23rd March 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Contract Law—Principal Partner.

Case No. 75 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Manbhoom, dated the 28th September 1874, reversing a decision of the Extra Assistant Commissioner of Rughoonathpore, dated the 19th September 1873.

Nirmul Chunder Dutt (one of the Defendants), *Appellant,*

versus

Showrobinee Dossee (Plaintiff) and others (Defendants), *Respondents.*

Baboos Bhowanee Churn Dutt and *Opendro Chunder Bose* for Appellant.

Baboo Gooroo Dass Banerjee for Respondents.

Where a plaintiff in a suit under the Contract Law was wife of the principal partner of a firm, in which defendants were minor partners, and the said principal had not been made a co-defendant: HELD that, though, in the absence of evidence, defendant, appellant, could not be assumed to be a mere servant and not a partner, yet the omission of the principal partner and debtor from the parties to the suit was fatal to the plaintiff's claim, which was accordingly dismissed.

Glover, J.—THE objection taken by the special appellant under the Contract Act seems to us untenable. No evidence has been given to prove that he was a servant or agent so as to bring his case within the purview of section 242, and in default of that the ordinary rule of partnership laid down in section 239 would apply.

But setting this objection aside, we think that the suit ought to have been dismissed by the first Court on the ground that all the necessary persons had not been made parties.

It was found as a fact by the first Court, and the finding was not contested in appeal, not only that Jadub Chunder was the principal in the firm of Mitter, Dutt & Co., but that the money itself, although furnished ostensibly by his wife, the plaintiff, was really his; but without considering this latter point further, it would be quite enough to dispose of the plaintiff's case, if it were

shewn, as it has been shewn, that the chief partner, indeed, it may be said, the real proprietor of the firm which is said to have borrowed the money, and in which the special appellant is an inferior partner, receiving a share of the profits in lieu of his labour, was Jadub Chunder, the husband of the plaintiff. He was undoubtedly a proper person to be sued, and ought to have been made a party to the suit, and the plaintiff being his wife was, of course, aware of his position in the firm. Instead of this, the defendants in the cause are the plaintiff's own minor son and the special appellant, and, strange to say, no decree has been passed against the former. The whole case has an air of fraud about it, but without going further into this part of the question, it is enough for us to say that the omission of the principal partner and debtor from amongst the parties sued, is fatal to the plaintiff's case, which is brought against the firm, and that the suit should have been at once dismissed on the finding come to by it regarding Jadub's position in the firm.

The decision of the Subordinate Judge is reversed, and the plaintiff's suit dismissed with costs.

The 23rd March 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Cause of Action—Confirmation of Title.

Case No. 1956 of 1874.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 3rd June 1874, reversing a decision of the Moonsiff of Begoosarai, dated the 9th February 1874.

Lalla Mahtab Roy (Plaintiff), *Appellant,*

versus

Debee Dutt Singh and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Kalee Kishen Sen* for Appellant.

Moonshee Serajul Islam for Respondents.

Where a plaintiff brought a suit for confirmation of his title to an estate, in consequence of the opposition offered by defendant to an application for parti a vendee who had purchased a portion of pla share, and the Court of first instance tried th on its merits, and gave the plaintiff a decree: that the Lower Appellate Court was not justi reversing a decision of the first Court on the g that no cause of action had been disclosed; bec although the plaint itself disclosed no cause of a yet, on the trial of the suit on its merits, a ca action had been disclosed in the opposition defendant had offered to the partition-proceedings, which had interfered with the enjoyment of his by the plaintiff.

Mitter, J.—In this case the L Appellate Court has, on the appeal of defendants, dismissed the suit upon ground that the plaint discloses no caus action.

This suit was for confirmation of pla iff's title to certain shares of Mou Moheshpore Kharji and Sehimpore Bisum and for registration of plaintiff's name the Collector's register by the removal those of the defendants. In the pl the title which was sought to be decla is stated with sufficient clearness.

The cause of action as alleged in plaint was, that plaintiff, having sold of his rights in those two mouzahs to Ram Lall, there was an application made the vendee to the Collector for partiti and that, after application was made to Collector, the defendants, in Bysack 127 opposed the prayer of Ram Lall, upon ground that neither he nor his vendors h any title to this property. It is alleged th this application, on the part of the defenda is the cause of action upon which plain was entitled to maintain this suit.

The defendants denied the plaintiff alleged title, and stated that, long before was alleged to have been created, they h purchased this property from the origin owner. They also state in the writt statement that, in the face of the plaint, the was no cause of action. The Court of fi instance, however, did not frame any iss with reference to this objection, but certa issues were laid down with reference to th question in dispute between the parti regarding the title to these two mouzahs and the lower Court found with referenc to these issues in favour of the plaintiff, and gave a decree in the plaintiff's favour.

Against this decree the defendants appeal ed to the Judge, upon the ground that the plaint discloses no cause of action, and the Lower Appellate Court decreed the appeal, and dismissed the plaintiff's suit, holding that it was a valid objection.

Upon the face of the plaint it is quite

d

ar that the view taken by the District ge that the plaint discloses no cause of on is correct, but at the same time we k that it was too late for the Appellate urt to dismiss the plaintiff's suit upon this ound after there had been a trial upon the rits by the Court of first instance, resulting in a decree in favour of the plaintiff.

We do not mean to say that it is not open to a Court of Appeal to dismiss any suit upon the ground that the plaint discloses no cause of action after there had been a trial upon the merits; but what we mean to say is this, that, in the course of the trial in the first Court in this suit, a cause of action was sufficiently established, although it was not put forward in the plaint.

It appears that, upon the application of Ram Lall, an Ameen was deputed to effect partition of this mouzah. The Ameen submitted his report to the Collector, and the parties were called upon to take steps with a view to have the partition effected according to the division made by the Ameen.

It was at this stage that, upon the opposition of the defendant, the Collector was obliged to withhold his hands and refuse to act on that application of Ram Lall for partition, and he referred the parties to a regular suit. It is clear, therefore, that if the plaintiff has a right and title to this property, the enjoyment of that right has been invaded by the opposition of the defendants. He has been deprived of the right to partition, which follows, as a matter of course, the right of a person holding property jointly.

There having been, therefore, a bar raised by the defendants against the plaintiff's right to have partition effected of this property, it gave rise to a cause of action upon which the plaintiff was justified in maintaining this suit. Therefore, although we fully agree with the Judge that, upon the face of the plaint the plaintiff did not put forward any valid cause of action, yet we cannot agree with him that the suit should be dismissed on that ground after there had been a trial upon the merits.

I ay as well notice here that the District Judge is not right in saying that the application for butwara was with reference to one mouzah, Mohespore, only.

It appears from the plaint that both mouzahs are claimed by the plaintiff in this suit as constituting a joint talook, which is 1009 or 1059—it does not appear clear what number really it was.

Therefore the opposition, which was put forward during the partition-proceedings by the defendants, would justify and would give a valid cause of action to plaintiff for maintaining this suit upon the grounds mentioned in the plaint with reference to both mouzahs.

For these reasons, we think that the Judge's order dismissing the suit is not right. We, therefore, reverse it, and remand the case to the Lower Appellate Court for trial upon the merits. But as in the plaint there was no valid cause of action put forward, we think that the plaintiff, special appellant, is not entitled to costs of this special appeal. Each party will, therefore, bear his own costs.

Glover, J.—I concur.

The 24th March 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

False Title—Compensation—Improvements—Pro-forma Party to Suit.

Case No. 493 of 1875.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 2nd October 1874, affirming a decision of the Sudder Moonsiff of that District, dated the 13th December 1873.

Moulvie Wahedoollah (Defendant), *Appellant,*

versus

Moulvie Golam Akbur (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose and *Moonshee Serajul Islam* for Appellant.

Baboo Bykuntnath Paul for Respondent.

Where a person had held a property on a false title, and the rightful owner had recovered possession after much trouble, HELD that the former was not entitled to compensation for improvements which he had made for his own convenience, and which were not made as the latter would have required.

Glover, J.—THE first ground taken in special appeal is, that, supposing that the plaintiff has a right to a share in this

property, he ought to be made to pay compensation to the defendant for the money spent by him in repairing and improving the premises.

This depends upon a great many considerations. If a party in the position of the defendant holding a property in his own possession, under what we must take to be a false title, chooses to spend money in making certain conveniences for his own use in this property, I do not see on what equitable ground he can demand compensation from a person such as the plaintiff, whom he has kept at arm's length for a long time, and who has at last succeeded, after much expense and trouble, in establishing his claim by shewing that the defendant is not in sole possession. But in any case it is found by the Courts below, and we do not see any reason for interfering with that finding, that these improvements were unnecessary, and such as the plaintiff would not have made for himself, and that no compensation should be given to the defendant. They are improvements, as I said before, which the defendant made for his own convenience. It would not be fair, therefore, to make the plaintiff pay for what he does not and did not want.

The second objection is, that the Courts below have not taken into consideration certain evidence which goes to prove that the house was Musst. Rabia's own property given to her by her deceased husband. It appears that the parties to this suit were in some shape or other before the Court in suit No. 739 of 1870, in which Fasiboonnissa Bibee brought the action, and the present plaintiff was a *pro-formâ* defendant. The Moonsiff has refused to consider the judgment in that case on the ground it is no evidence against the plaintiff, because he was only a *pro-formâ* defendant there. It is contended that the Judge, in deciding the case in the same way as the Moonsiff, ought to have taken this point into consideration, inasmuch as this decision was, under the Evidence Act, evidence of some kind against the plaintiff as shewing that the property once belonged to Musst. Rabia. I do not find that this objection was taken before the Judge in the grounds of appeal. But supposing that it was, and it certainly appears to have been argued before him, I do not see that he agrees with the first Court that this decision was no evidence. He merely says that he agrees with its finding that the defendant failed to prove what he wished to prove by means of this d I do not understand him to say th no evidence at all, but that, taki whole case together, he does not reason for disagreeing with the result at by the Moonsiff. The judgment is what short on this part of the case, so clear as it might have been. think that this is what is meant.

It appears to us, therefore, that appeal must be dismissed with costs.

Mitter, J.—I concur.

The 27th March 1876.

Present:

The Hon'ble F. A. Glover and Rom Chunder Mitter, *Judges.*

Service Tenure—Arrears of Rent—Exec sale—Police Jagheer—Private Service T —Public Service Tenure.

Case No. 253 of 1875.

Miscellaneous Appeal from an order by the Judicial Commissioner of C Nagpore, dated the 17th May affirming an order of the Deputy C missioner of that District, dated the December 1874.

Rajah Nilmonee Singh Deo (Decree-hold *Appellant,*

versus

Kashee Mahtoon and others (Judgment-debtors), *Respondents.*

Baboo Bhowanee Churn Dutt for Appell

Baboo Sreenath Banerjee for Respond

A service-tenure can be sold in execution of a d for arrears of its own rent, provided that the servic from the holder be of a private kind and persona the plaintiff, but not where the service is of a pu kind, as in the case of a police jagheer.

Mitter, J.—On the 27th June 1867, t plaintiff, decree-holder, obtained a dec against one Murdone Mahto for arrears rent, on account of a jagheer tenure held b the defendant. The original holder of th tenure, Murdone Mahto, against whom th decree was obtained, having died, it has no come to the possession of his sons who are respondents in this appeal. The plaint

ght to sell a portion of the jagheer in isfaction of his decree. The respondents posed this application on the ground that ch lands are not saleable in execution of cree. The lower Courts have refused the intiff's prayer on the ground that the endant's tenure, being police jagheer, is saleable in execution of decree. Against t order the plaintiff has preferred this peal.

The rent, on account of which the decree question has been passed, being rents due m the tenure, the plaintiff, decree-holder, dinarily would be competent to sell the ure for the satisfaction of its own arrears rent. This general right would not be en away, because the defendant's tenure s a service-tenure. If the service with ich the tenure is burdened be of a private ure personal to the plaintiff, no valid jection can be raised against the plaintiff's oceeding to cause the tenure to be sold in ecution of the decree; because if, in conquence of that sale, the required service ase to be rendered, nobody except the aintiff would be sufferer thereby. But if, the other hand, the service in question of a public nature, it is quite evident that tenure, which is burdened with it, cannot sold by competition at a public auction. erefore the determination of the question ised in this case depends upon an inquiry to the nature of the service which the lder of a particular jagheer is required perform.

The Court of first instance held that this gheer is a police jagheer. It relies upon decision in a Civil Suit No. 111 of 1863 in pport of this conclusion. The Lower ppellate Court has upheld this finding. If, erefore, we were satisfied that this finding as based upon proper materials, we would t have interfered with the decision of the wer Courts. But the Civil Court decision ferred to by the first Court is not on the cord, and we do not see any other material oduced sufficient to support the finding. fore we confirm an order by which ordiary rights of a party are materially affected, e must be satisfied that it is based upon the roper materials. We, therefore, remand is case to the first Court for a full inquiry nto this point. Before the lower Courts fuse the plaintiff's prayer to sell the tenure execution of a decree obtained for its wn arrears of rent, it must be clearly established that the service with which it is addled is of a public nature. Costs to abide the result.

The 28th March 1876.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Joint Family—Partition—Joint Acquisition.

Case No. 1294 of 1875.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 13th March 1875, reversing a decision of the Sudder Moonsiff of that District, dated the 29th April 1874.

Pitambur Chuckerbutty (Defendant), *Appellant,*

versus

Surbango Soonderee Debee (Plaintiff), *Respondent.*

Baboo Saroda Churn Mitter for Appellant.

Baboo Gopee Nath Mookerjee for Respondent.

The presumption that any acquisition by a joint Hindoo family is a joint acquisition, unless the purchase-money is shown to have come from a separate source, is inapplicable to any case in which the acquisition is not shown to have been anterior to a partition which is proved to have occurred, and is alleged to have occurred, after the separation; and it is sufficient to rebut the presumption to prove that a partition has taken place in accounts and collections, and not actually by metes and bounds.

THIS suit was brought to recover possession of a 2-anna fractional share of a tank, from which the plaintiff alleged that she had been dispossessed by the defendant. The plaintiff's allegation is, that 12½ annas' share of this tank was an ancestral property of the principal defendant and her vendor and his three brothers; that the grandfather of the principal defendant, Pitambur, and the grandfather of the plaintiff's vendor and his three brothers were uterine brothers. The plaintiff's purchase is from one of these co-sharers.

Defendant, on the other hand, alleged that the plaintiff's vendor and his brothers had no share in this tank; that the whole 12½

annas' share was acquired by his father and himself after the family had separated.

The Moonsiff dismissed the suit. He found that the first acquisition of a share in this tank took place at a time when the father of plaintiff's vendor was separate from the father of the principal defendant. The bill of sale, under which it was acquired, was in the custody of the defendant, and produced by him in the case. It purports to sell to defendant's father 5 annas 13 gundas 1 cowree 1 krant share. From these facts, and also from the failure of the plaintiff to prove that her vendor had any share in the tank, the Moonsiff came to the conclusion that the plaintiff's case was not true. It seems to have been an admitted fact before the Moonsiff that, at the time when the sale of the disputed share to the plaintiff took place, the principal defendant was not joint with the plaintiff's vendor, and the separation took place some time before that. One of the plaintiff's witnesses deposed to that effect, and it was a principal element of the defence. In the memorandum of appeal filed by the plaintiff it was distinctly admitted, and was made the foundation of an argument in her favour.

In this state of things, the District Judge has mainly based his judgment, which is in favour of the plaintiff, upon the well-known presumption that arises with reference to acquisitions by a joint Hindoo family. He has held that, as the defendant failed to establish the source from which the money came by which the shares in the tank were acquired, it must be presumed that the acquisition was joint. He first of all relies upon a passage in the deposition of the defendant in coming to the conclusion that the family was still joint in estate. The defendant in his deposition distinctly asserts that his father and uncle had separated before 1254 when the first purchase took place. One of the plaintiff's witnesses also stated that her vendor and the defendant were separate from a long time since. In her ground of appeal, the plaintiff accepted this evidence as true. With the light of these facts, if we read the passage upon which the District Judge relies, it will be clear that what the defendant asserts is simply that the admitted ancestral properties had not been actually divided by metes and bounds. He never admitted that the profits of these properties constituted a joint fund, and were not divided or realized separately. I am, therefore, of opinion that the presumption of the Hindoo Law upon which the judgment of the Lower Appellate Court is based [illegible] not have been made in favour of the pl[illegible] until it was established by her that [illegible] whole or any part of the aggregate [illegible] of the tank in dispute was acquired [illegible] time when the family of the defendant [illegible] her vendor was joint. This latter fa[illegible] not been found by the Judge in favour [illegible] plaintiff. Therefore it was not rig[illegible] presume that the acquisition was for [illegible] benefit of all the members of the fa[illegible] For these reasons, I think the judgme[illegible] the Lower Appellate Court is erroneo[illegible] law, but, as the District Judge has expr[illegible] no opinion upon the plaintiff's evid[illegible] adduced to establish her case affirmati[illegible] I remand this case to him for re-trial. [illegible] costs to abide the result.

The 28th March 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Right of Way—S. 2, Act VIII. of 1839—[illegible] Adjudicata—Cause of Action.

Case No. 2150 of 1875.

Special Appeal from a decision passed [illegible] the Judge of the 24-Pergunnahs, dated [illegible] 21st July 1875, reversing a decisio[illegible] the Officiating First Moonsiff of Sath[illegible] dated the 25th January 1875.

Nureem Mundle and another (two of th[illegible] Defendants), *Appellants,*

versus

Boramdy Sirdar (Plaintiff), *Respondent.*

Baboo Mohendro Nath Bose for Appellants.

Baboo Troyluckho Nath Miller for Respondent.

Where a suit for right of way was once thrown [illegible] on the specific ground that, according to plaintiff's [illegible] statement, the road in suit was a public one, and [illegible] the Court had no jurisdiction, HELD that, as the [illegible] cause of action, namely, the obstruction of the [illegible] was not decided in the first trial, s. 2 of the Co[illegible]

of Civil Procedure did not bar a second suit for the removal of the obstruction.

THE first point taken in special appeal is that the plaintiff's suit is barred by section 2 of the Civil Procedure Code, the previous suit between the same parties having been decided adversely to the plaintiff. Now the words of section 2 are: "The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties." The parties, no doubt, were the same, and it may perhaps be said that the suit was the same, at all events to some extent, inasmuch as it was for permission to pass along a pathway leading from one piece of land to another. The point is whether that right was heard and determined in the suit previously brought. It appears that, on the occasion of the suit first instituted, the Court found on the plaintiff's own statement that the road was a public one, and on that ground at once threw out the plaintiff's case as not having jurisdiction to try it, Can it be said that that decision was a determination of the right claimed now by the plaintiff? The cause of action was an obstruction. Was that determined? Clearly, I am of opinion, it was not. The Court refused to determine it on the ground that the road was a public one, and, therefore, no individual had a right to bring a suit with regard to it. It seems to me, therefore, that, on this point, the Judge was right, and that the suit was not barred by the principle of *res adjudicata*.

Then it is said that the evidence is not sufficient to support the right claimed by the plaintiff, and it is urged that there is no evidence to show that the right was exercised continuously for upwards of twenty years. But the Judge undoubtedly finds that the road has been used by the plaintiff as of right for twenty years, and he likewise finds that the defendant has altogether failed to disprove the allegation. No doubt there are no words in the Judge's decision which say that the exercise of this right has been continuous. But, when the Judge finds that the road has been existing and has been used as of right for twenty years and more by the plaintiff, the presumption is that he means to find also that the right has been continuously used.

There is no ground for a special appeal in this case. The appeal is dismissed with costs.

The 28th March 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Case No. 992 of 1875.

Resumption—Lakhiraj Lands—Onus of Proof—Limitation.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 30th December 1874, modifying a decision of the Moonsiff of Kutwa, dated the 19th June 1873.

Erfanoonnissa (Defendant), *Appellant,*

versus

Pearee Mohun Mookerjee (Plaintiff), *Respondent.*

Baboos Sham Lall Mitter and *Anund Gopal Paleet* for Appellant.

Baboo Ashootosh Mookerjee for Respondent.

In a suit for resumption of lands alleged to be lakhiraj, the onus of proof that the lands are not lakhiraj falls on the plaintiff; and even the admission of the defendant that the lands in suit fall within plaintiff's estate does not amount to evidence that they are mâl lands. Suits for the resumption of lands which were alleged to be lakhiraj at the time of the Permanent Settlement cannot now be brought with success, being barred by limitation.

Mitter, J.—THIS was a suit for resumption of 7 beeghas 15 chittacks of land held by the defendant under an alleged lakhiraj title. The plaintiff is the representative of an auction-purchaser, and the suit was commenced within twelve years from the date of auction-purchase. The plaintiff alleged that the land in suit appertained to the mâl

estate, and was held under the pretence of a lakhiraj title by withholding payment of mâl rent only from a comparatively recent time.

The defendant alleged that the lands in suit were valid lakhiraj. At first both the Courts below dismissed the plaintiff's suit, notwithstanding that they held that the onus of proof in such a case as this was upon the defendant. The Lower Appellate Court, on an application for review having been made, has given to the plaintiff a decree for a portion of the land, holding that the defendant has failed to establish his case with reference to it. The defendant has preferred this special appeal against that decision.

The only question raised before us is that the lower Courts were wrong in throwing the burden of proof upon the defendant. We think this contention is valid, and is supported by a Full Bench decision of this Court reported in page 205 of the 2nd Weekly Reporter, and a decision of the Judicial Committee of the Privy Council reported in page 152 of the 14th Moore's Indian Appeals.

The learned pleader for the respondent, on the other hand, contends that the Full Bench decision quoted above does not apply to this case, because the plaintiff represents an auction-purchaser; and it has been so decided by this Court in three cases, reported in pp. 69, 152, and p. 191 of the 3rd and the 5th Weekly Reporter respectively.

The first two cases fully support his argument, and it can be inferred from the report of the third case that the learned Judges who admitted the application for review referred to in it were also of that opinion. But we think that the question before us has been conclusively set at rest by the Privy Council judgment referred to above. Although, from the report of that case, it does not appear whether the plaintiffs there, in any way, represented auction-purchasers for Government revenue or not, yet an examination of the grounds upon which it is based shows that its principle is applicable to cases of ordinary nature as well as of auction-purchases.

In the first part of the decision, the Members of the Judicial Committee who passed it proceed to examine the provisions of the Regulations bearing upon the question, and the result according to that examination was, that suits for resumption of invalid lakhiraj lands that existed at the time of the Permanent Settlement were dealt with under the provisions of special and exceptional legislation, *viz.*, Regulation XI. of 1819. In suits there is a presumption in favour of plaintiff arising out of the declaration in the Regulation that "the ruling pow was entitled *primâ facie* "to a certain portion of the produce of every beegh That, in these exceptional cases, the defe ant has generally to support the burden proof.

"The invocation of the 30th section "Regulation XI. of 1819," they observe, "not mere matter of form to be rejected "surplusage. The effect of it is to c "the case to be tried according to the "cedure and presumptions prescribed "that enactment, and the enactment "*pari materiâ*, greatly to the advantage "the plaintiff, and consequently to the "judice of the defendant." This was suit under the 30th section of Regula XI. of 1819, and, in fact, by the provision section 14 of Act XIV. of 1859 (w provisions have been re-enacted in the sent Limitation Act), such a suit now ca be maintained with success. Because you admit that a lakhiraj tenure existed at time of the Permanent Settlement—and must be admitted to bring the case wi Regulation XI. of 1819—you are hopeles barred. Therefore the presumption wh arises in such suits in favour of the plain and which relieves him from any burthen proof farther than to establish that the la in suit is within the ambit of his estate, do not arise in favour of the plaintiff in this ca by reason of the special provisions of lakhiraj Regulations mentioned abo Then let us see whether that presumpt avails the plaintiff in any way in a suit li the present, which was brought upon allegation that the lands sought to be sumed did not form any existing lakhi tenure at the time of the Permanent Set ment, but were assessed with revenue, a constituted a part of his mâl estate. T presumption in question carries the plaintiff case no farther than this—that every beegh of land within the ambit of his estate, under th provisions of lakhiraj Regulations, was liabl to be assessed with Government revenue, an the title to especial exemption must be made out by the party setting it up. But this is not sufficient to start a case for the plaintiff in a suit of the present description; because there is no presumption that every beegha of land within the ambit of an estate must be deemed to have been assessed with revenue until the contrary is proved. The following passage from the Privy Council report

referred to above shows that it is upon this ground that the Judicial Committee have held that the burden of proof in these cases is upon the plaintiff.

"Again their Lordships think that no "just exception can be taken to the ruling "of the High Court touching the burthen of "proof which, in such cases, the plaintiff has "to support. If this class of cases is taken "out of special and exceptional legislation "concerning resumption-suits, it follows "that it lies upon the plaintiff to prove a "*primâ-facie* case. His case is, that his mâl "land has, since 1790, been converted into "lakhiraj. He is surely bound to give "some evidence that his land was once "mâl."

Then further on they observe: "Mr. "Doyne argued that the defendants had "admitted that the lands in question . . . . "were within the appellant's estate. But "such an admission is obviously not suffi-"cient to meet the burthen of proof thrown "upon the plaintiff. It was at most an admis-"sion that the lands were within the ambit "of the estate, not that they had ever been "mâl lands."

Now these are the grounds upon which their Lordships of the Judicial Committee have held that the burthen of proof is upon the plaintiff, and unless we hold that, in the case of an auction-purchaser, as soon as it is proved that a particular plot of land is within the ambit of his estate, there arises a presumption in his favour that it was assessed with revenue at the time of the Permanent Settlement, there seems to be no valid reason why we should hold that these grounds are not applicable to the present case. Therefore, notwithstanding the decisions quoted from the 3rd and 5th Weekly Reporter, we must hold on the authority of the Privy Council decision quoted above that the lower Courts have erred in relieving the plaintiff from the burthen of proof which ordinarily falls upon him. How far the plaintiff has been able to discharge that burthen it is not for us in special appeal to decide. We must, therefore, reverse the decree of the Lower Appellate Court, so far as it is favourable to the plaintiff, and remand the case to that Court for re-trial as regards the particular portion of the claim which was decreed in his favour. Costs to abide the result.

Glover, J.—I concur in this judgment, and in doing so I do not forget that I at one time held a different opinion.

The 29th March 1876.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Unregistered Document when Evidence—Implied Consent—Pucka Building.

Case No. 2739 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 19th August 1874, affirming a decision of the Sudder Moonsiff of that District, dated the 30th December 1873.

Lalla Gopee Chand and others (Plaintiffs), *Appellants,*

versus

Shaikh Liakut Hossein and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Moonshee Mahomed Yusuf for Respondents.

In a case in which plaintiffs sought to recover possession of some land on which defendants had constructed a pucka house, and in which defendants pleaded that they had purchased a building right from a third party with whom plaintiffs had settled the land, and that plaintiffs had seen them building the house in question without offering any objections, HELD that, having stood by and allowed defendants to build the house, plaintiffs could not sue to have the house removed: HELD, also, that an unregistered document, when followed up by delivery of possession, may be used as evidence of that possession.

Kemp, J.—THE special appellants are the plaintiffs in this case. They sued to recover

possession of three cottahs of land according to the boundaries given at foot of the plaint, and to demolish a house erected by the defendants on the said land.

The principal defendants, in their written statement, allege that the plaintiffs had settled the land in dispute on the 13th of April 1859 with Kedar Nath and others, who built a mud house on the land, and lived in it for some time themselves; that Kedar Nath and others then sold it to them under a deed dated the 16th of December 1859; that they had spent more than Rs. 5,000 in constructing an upper-roomed pucka house in place of the mud house which was upon the land; and that the plaintiffs, with full knowledge of this fact, stood by and allowed them to do so without opposition; and that consequently the plaintiffs were not entitled to succeed in this suit.

Both the Courts have dismissed the plaintiffs' suit.

The grounds taken in special appeal are, *first*, that the unregistered pottah of Kedar Nath is not admissible in evidence; and that, therefore, the lower Courts were wrong in law in accepting and giving effect to that deed; and, *secondly*, that the mere fact of the special appellants offering no opposition to the erection of the building does not necessarily disentitle them from suing for recovery of the land on which the building was erected, as erroneously held by the Judge. These are main points urged in special appeal.

As to the first point, the Moonsiff held that an unregistered document, if followed up by delivery of possession, may be used as evidence of that possession; and that finding has been confirmed by the Judge. We see no reason for disturbing that finding.

Then, with reference to the next objection, we also think that the lower Courts have come to a right finding that, when the plaintiffs stood by and allowed the defendants to erect this house on their land, they cannot now sue to have that house removed. The principle is laid down in 7 B. L. R. 152.* That was a case which went up on appeal before three Judges, and was considered by the late Chief Justice, Sir Barnes Peacock, who held that, if the plaintiff allowed the defendants to erect pucka buildings upon the land, he would be bound in the same way in equity as if he had granted them a pottah with the privilege of building pucka houses on the land.

* 12 W. R. 495.

The special appeal is dismissed with costs.

The 30th March 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Abatement of Rent.

Appeal under section 15 of the Letters Patent from a decision passed by the Hon'ble G. G. Morris, dated the [illegible] January 1876, in Special Appeal No. [illegible] of 1874.

Omur Sirdar (Plaintiff), *Appellant,*

versus

Pertap Chunder Banerjee (Defendant), *Respondent.*

Moonshee Serajul Islam for Appellant.

Baboo Sreenath Banerjee for Respondent.

A non-occupancy ryot cannot maintain a suit for abatement, on the ground that similar lands rent for less than his in the neighbourhood.

Markby, J.—We concur with the judgment of Mr. Justice Morris to the extent of saying that a non-occupancy ryot cannot maintain a suit for abatement of rent on the ground that the land which he holds is land of a description for which ryots of the same class and with similar advantages in the vicinity pay less than himself. But, before entering into the other question, namely, whether an occupancy ryot can maintain a suit for abatement upon similar grounds, we think it desirable that the question of fact should be determined, namely, whether the plaintiff, in this particular suit, is an occupancy or a non-occupancy ryot. That question was determined by the first Court against the plaintiff. We direct the Court of Appeal to come to a finding upon that issue which was raised in the appeal, and

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aid Court will return its finding upon issue to this Court.

pon that finding being returned, we shall dispose of this appeal.

The 30th March 1876.

Present :

The Hon'ble F. A. Glover, *Judge.*

ht of Occupancy—Relinquishment—Year by Year.

Case No. 2544 of 1875.

ecial Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 13th August 1875, reversing a decision of the Sudder Moonsiff of that District, dated the 25th May 1875.

Raghoonath Sonar and another (Plaintiffs), *Appellants,*

versus

Mokoond Doss and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Radhika Churn Mitter for Respondents.

Any ryot, holding under any purchaser of a permanent transferable interest in land can acquire a right of occupancy if he fulfil the other conditions required by the law; and the mere fact that a certain rent is reserved year by year does not interfere with his right, unless something in his pottah is fatal to it. But the right may be extinguished by a relinquishment of the land.

The first question to be decided in this case is the defendant's allegation that the plaintiff had resigned his pottah, and given up possession. If that be found in favour of the defendant, the plaintiff's case must be disposed of against him.

The Judge has not gone into this question, although the first Court did so, but has decided the case on a different ground. He says, because the pottah which the plaintiff had was not for a term of years, and that under it only an annual rent year by year was reserved, and because the plaintiff held that pottah from a person who was himself a ryot, therefore he could not obtain a right of occupancy, and consequently had no right to recover possession of the land, he being simply a *koorfa* tenant of the sudder ryot.

The point for decision here is, what was the position of the lessor of the plaintiff, Bijoy Kristo? It appears to be admitted that this person obtained his right by purchase, and, as a right of occupancy, cannot ordinarily form the subject of a purchase, it would seem that he bought a permanent interest in the land. Therefore the prohibitory clause of section 6 of Act VIII. of 1869 will not apply. If the plaintiff's lessor was a person having a permanent transferable interest in the land, the ryot holding under him, if he fulfilled the other requirements of the law, would have a right of occupancy in the land. The mere fact of his holding under a pottah which reserved only an annual rent year by year would not be sufficient to deprive him of the privilege. It would have to be shown that there were some words in the pottah prohibiting him from acquiring that right. And if that is not shown, and if under the pottah he paid rent for more that twelve years, year by year, regularly, to the landlord, he would then, I conceive, obtain a right of occupancy as a matter of course.

Before, therefore, this case can be decided, it must first be seen whether the plaintiff had a right to re-enter, or whether such right as he had was extinguished by his relinquishment of the land in 1267, and as regards the other plaintiff by his relinquishment in 1269. If these points are found in favour of the plaintiff, the lower Court will have to see what was the interest of Bijoy Kristo in the land; whether it was a right of occupancy or a permanent transferable interest. If the latter, it must then be seen if there is anything in the pottah which prohibits the plaintiff from acquiring a right of occupancy under it.

The case is remanded to the lower Court with reference to the above remarks. Costs will follow the result.

The 31st March 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Written Statement—Issue.

Case No. 935 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 19th February 1875, modifying a decision of the Moonsiff of Lushkerpore, dated the 30th November 1874.

Suttya Narain Dutt (one of the Defendants), *Appellant,*

versus

Shumbhoo Chunder Dutt (Plaintiff), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Joy Gobind Shome for Respondent.

A written statement filed by a defendant in a contested case might generally be construed into a denial of the plaintiff's claim, but, where defendant agrees to be bound by an issue which is derived from the written statement, he cannot, in special appeal, urge that that issue did not cover the whole objection raised by him.

I DO not see any reason for interfering with the judgment of the Lower Appellate Court in this case.

With regard to the first objection about the want of evidence in support of the kobala, it is not taken in the petition of appeal to the Court below; and I think that a sufficient reason for not allowing it here.

As to the second objection, no doubt, the written statement of the defendant might be construed into a denial of the plaintiff's right by inheritance to the whole of the lands in dispute. But, as a matter of fact, it was taken by the Moonsiff to be a denial as regards plot 3 only, and an issue was raised on that question If the defendant saw that the issue did nor express the objection which he raised to the plaintiff's case, but agreed to be bound by the finding on that issue, I do not think he has now a right to come forward and say that that issue did not cover the whole of the objection raised by him. As I said before, the written statement might possibly be made to refer to the whole of the land, but, as a matter of fact, it was held to refer to plot 3 alone; and, if it is ta simply referring to plot 3, the obj raised in special appeal that there decision on the question of inher regarding plots 1 and 2 of course fails.

The appeal is dismissed, but, under circumstances, without costs.

The 31st March 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, C *Justice*, and the Hon'ble E G. Birch, *J*

Relation of Landlord and Tenant.

Case No. 80 of 1875.

Special Appeal from a decision passed the Judge of West Burdwan, dated 7th October 1874, affirming a deci of the Moonsiff of Bishtopore, d the 30th June 1874.

Krishna Ghose (Plaintiff), *Appellant,*

versus

Ram Narain Mohapattur (Defendant), *Respondent.*

Baboo Bama Churn Banerjee for Appella

Baboo Bunshee Dhur Sen for Respondent.

Even where a defendant in a suit for arrears of r acknowledges that he is a tenant, and not the owner, proves that he has previously been paying rents to s middleman, HELD that the plaintiff cannot recover r from defendant before satisfying the Court that middleman's interest has ceased, and that he has some way, become defendant's landlord.

Garth, C.J.—WE have taken some time consider our judgment in this case, becau during the argument, we were much stru with the apparent injustice of allowing t defendant to retain possession of the lan of which he avows himself to be, not t owner, but the tenant, without paying an rent to the plaintiff.

But, upon consideration, we do not think that the judgment of the Court below involves necessarily any injustice of this kind. The plaintiff is bound, before he can establish the defendant's liability to pay rent to him, to show that, either by arrangement or by force of law, the defendant has become his (the plaintiff's) tenant.

Courts below have decided that the has not proved his case in this res- and we think that they are right in so It is plain that the persons under the defendant holds the property were to the dur-mokurrureedar, that the dant purchased their interests, and has paid rent to the dur-mokurrureedar. was incumbent, therefore, on the plaintiff, e he could succeed in this suit, to satisfy Court that the dur-mokurrureedar's in- had ceased, and that he had become in way or other the defendant's landlord. is, in our opinion, he has failed to do; we think, therefore, that the judgment of Court below is right.

he appeal is dismissed with costs.

The 31st March 1876.

Present:

Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Mesne-profits—Interest—Execution.

Case No. 311 of 1875.

ellaneous Appeal from an order passed the Judge of Tirhoot, dated the 14th ugust 1875.

haikh Abdool Ali (Judgment-debtor), *Appellant,*

versus

Mussamat Asruffun and others (Decree-holders), *Respondents.*

eonshee Mahomed Yusuf for Appellant.

No one for Respondents.

here a decree is silent touching interest or mesne- s subsequent to the institution of a suit, the Court ting the decree cannot assess or give execution for interest or mesne-profits. But the decree-holder assert rights of this nature, if they exist, in a separ- uit.

irch, J.—In this case, the Subordinate ge has allowed interest upon mesne- its, although the decree, which he was cuting, had not awarded interest. The ordinate Judge says: "I am clearly of pinion that decree-holder is entitled to nterest on wassilat from the date of its djustment at the rate of 6 per centum per nnum, for the simple reason that interest follows, as a matter of course, where there is no order to the contrary. The reason for the Court's judgment being silent on the subject was that there was no such question raised then. But, as it was now "raised, the Court, considering the nature "of the original orders passed, has no hesi- "tation in awarding interest, under the pro- "visions of section 11, Act XXIII. of 1861, "from the date of its ascertainment, and not "from the date of the decree." The decision of the Subordinate Judge is opposed to the rulings of this Court. Several have been pointed out to us, and a very recent decision of the Privy Council, reported at page 383, Volume XV., Bengal* Law Reports, authoritatively disposes of the point raised in this appeal.

* 24 Weekly Reporter 193.

In that case, the District Judge, while allowing mesne-profits which had accrued subsequent to the date of the decree to be recovered in execution, refused to allow interest thereon, as the decrée was silent as to interest. Upon appeal to the High Court of Madras, the District Judge's order awarding mesne-profits was reversed. The decree-holder appealed to the Privy Council, and it was contended on his behalf that an order decreeing possession carried by its own force the right to mesne-profits and to interest thereon, although the decree gave no direction as to either. On the other hand, it was urged by the Counsel for the respondent that all the High Courts of India have now accepted as settled law that, where the decree is silent touching interest or mesne-profits subsequent to the institution of the suit, the Court executing the decree cannot assess or give execution for such interest or mesne-profits.

Upon this their Lordships say: "That "this construction has now for several years "prevailed in the High Court of Calcutta "is shown by the Full Bench Ruling of the "13th September 1866, Mosoodun Lall "*vs.* Bheekaree Singh (1), the decision of "the 18th of June 1868, Hara Mohini "Chowdhrain *vs.* Dhanmani Chowdhrain (2), "and numerous other cases. That it has "been adopted by the other High Courts is "shown; as to that of the North-West "Provinces, by the decision of the 10th of "November 1869, Chowdhry Nain Singh "*vs.* Jowahur Singh (3), as to that of Madras, "by the ruling of the 12th of February "1869, Subha Vencataramaiyan *vs.* Subraya "Aiyan (4), and as to that of Bombay, by "the Full Bench Ruling of the 10th of De- "cember 1867, in Radhabai *vs.* Radhabai (5), "followed by the decision of the 15th "June 1869 in Sitaram Amrut *vs.* Bhagvant "Jaganath (6)."

The alleged *consensus* of the Indian

Courts being thus established, their Lordships, whatever their opinion upon the construction of this clause might have been had the question been *res integra*, do not think it would be right to run counter to so long a course of decision upon what is, in fact, merely a question of procedure, it being admitted that the plaintiff may assert rights of this nature, if they exist, in a separate suit. They, therefore, accept the construction of the Indian Courts as settled law; and that acceptance, as was admitted at the bar, suffices to dispose of the claim to interest on the subsequent mesne-profits which is raised by the present appeal.

We think that the Subordinate Judge is clearly wrong in saying that interest follows as a matter of course where there is no order to the contrary.

The order of the Subordinate Judge is reversed, and the appeal is decreed with costs.

The 31st March 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Double Mortgage—Prior Lien.

Case No. 28 of 1875.

Special Appeal from a decision passed by the Officiating First Subordinate Judge of Bhaugulpore, dated the 30th September 1875, affirming a decision of the Moonsiff of Monghyr, dated the 9th May 1874.

Cheit Narain Singh and others (Defendants), *Appellants*,

versus

Gunga Pershad (Plaintiff), *Respondent*.

Mr. R. E. Twidale for Appellants.

No one for Respondent.

Where a certain property was mortgaged on two different occasions to different parties, and possession of the property was obtained by the purchaser property on its sale on foreclosure of the seco gage, HELD that the purchaser could only be to possession after discharging the lien creat the property by the earlier mortgage.

Garth, C.J.—WE think the deci the lower Court is wrong in point of la

Both Courts take the same view facts, and we must adopt that view.

The original owner of the property cuted a mortgage-bond to Manjhee Sa the year 1864. Manjhee Sahoo quently brought a suit, and obtained a m decree for the amount of that bond in and in 1871 a sale of the mortgaged perty took place under that decree, and plaintiff became the purchaser.

Previously, however, to this, the fo owner had further mortgaged the same perty by another bond to the defe Cheit Narain Singh, who subseq obtained a decree with an order for sa the property; and under that order property was sold and purchased by defendants, who obtained possession.

The plaintiff then instituted this s obtain possession from the defendants, the Courts have held that he is entitl possession without regard to the lien w Cheit Narain Singh had upon the pro in respect to the second mortgage.

The defendants have appealed against decision on the ground that, when pla purchased the right of the judgment-de that right was already subject to the de ants' lien, and that his purchase and to possession would, therefore, be subje that lien.

In this we think the defendants' co tion is right, and we, therefore, modify decree of the lower Courts to this e that the plaintiff is only entitled to po sion of the property upon his discha the lien created upon it by the mortga Cheit Narain Singh.

The appeal will be allowed with costs this appeal and of the appeal to the Lo Appellate Court.

The 31st March 1876.

Present:

n'ble Romesh Chunder Mitter, *Judge.*

ession—Establishment of Title—Limita-Relinquishment—Form of Objection of ation.

Case No. 1464 of 1875.

Appeal from a decision passed by Judge of Bhaugulpore, dated the April 1875, affirming a decision of Sudder Moonsiff of that District, the 22nd January 1875.

mut Dhurjobutty Chowdhrain (one of the Defendants), *Appellant,*

versus

nroo Mundul (Plaintiff), *Respondent.*

Mr. J. Younan for Appellant.

aboo Juggut Chunder Banerjee for Respondent.

re a suit was brought to recover possession of which plaintiff alleged that he was dispossessed emindar in Jeyt 1281, and the zemindar rejoined aintiff had relinquished the greater portion of d in suit in Bysack 1280, and was now barred ation, HELD that, as this was a suit to recover ion by establishment of title, plaintiff was at to bring it within twelve years, and was not by the lapse of one year.

bjection of limitation is not most suitably ed by evidence of a relinquishment from a period, se of time from which exceeds the period of on.

s suit was brought by the plaintiffs to r possession of 3 beeghas and 3 cottahs d, on the allegation that they had been ssessed by the zemindar in Jeyt 1281.

e suit was commenced within one year the alleged date of dispossession.

e zemindar-defendant, in respect of a n of the land in suit, namely, 2 beeghas ttahs, alleged that the plaintiff had uished it in Bysack 1280. He also ed limitation of one year under section ct VIII. (B. C.) of 1869, upon the ground he plaintiff was not in possession since date of relinquishment, and the suit commenced more than one year after ck 1280.

he Moonsiff decreed the plaintiff's suit, ruling the plea of limitation, holding the suit was commenced within one year the date of dispossession, namely, 1281.

he defendants appealed, and in their nds of appeal, they said that, as they had been in possession of this property from Bysack 1280 in consequence of the plaintiff's relinquishment, the plaintiff's suit was barred by limitation.

The District Judge, in appeal, decided this question of relinquishment against the defendants.

In special appeal, it is contended before me that the Lower Appellate Court should not have decreed the plaintiff's suit without finding in favour of the plaintiff that his possession was established within one year from the date of suit.

I do not think that this contention should prevail. In the first place, it does not seem to me that the provisions of section 27, Act VIII. (B. C.) of 1869, are applicable to this suit. It is true that the Moonsiff registered this suit as a suit under Act VIII. of 1869. But, on looking to the allegations of the parties, and the issues that were raised, it seems that it should not have been registered as a suit under Act VIII. of 1869. The plaintiff sought to recover possession of this property by establishment of his title, namely, the right of occupancy and ancestral holding. It has been decided that such a suit as this was not cognizable under Act X. of 1859. And, therefore, I think that the Moonsiff was not right in treating this suit as a suit under Act VIII. of 1869. Therefore, taking the defendants' allegation as proved, namely, that they have been in possession of this property since Bysack 1280, still the plaintiff's claim would not be barred, because he would be entitled to bring this suit within twelve years from the date of dispossession.

Secondly, I also think that, assuming for argument's sake that this was a suit that was properly registered under Act VIII. of 1869, the decision of the District Judge sufficiently disposes of the plea of limitation that was raised before him. It is true that, in an ordinary case, it is for the plaintiff to prove that his cause of action accrued within the time allowed by law. And that fact, namely, that the suit was brought within one year from the date of dispossession, was established to the satisfaction of the Moonsiff. The defendant contested this point before the Judge, not on the ground that the plaintiff's evidence was not sufficient to prove his possession within one year, but upon the ground that the evidence adduced by him to prove relinquishment was sufficient, and, therefore, as a consequence of that evidence, the plea of limitation was made out; that is to say, the defendant relied upon his own

evidence of possession for more than one year to put the plaintiff out of Court on the plea of limitation. Therefore, looking to the peculiar form in which this objection of limitation was raised before the Lower Appellate Court, I cannot say that that Court was wrong in overruling it after having come to the conclusion that the defendants' plea of limitation was not made out.

On both these grounds I am of opinion that this objection should not prevail. The special appeal is, therefore, dismissed with costs.

The 31st March 1876.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Ejectment—Permanent Transferable Interest.

Case No. 1871 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of East Burdwan, dated the 17th May 1875, reversing a decision of the Moonsiff of Jehanabad, dated the 22nd December 1874.

Sreenibash Laek (Defendant), *Appellant,*

versus

Prosunno Coomar Mitter (Plaintiff), *Respondent.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Umbika Churn Bose for Respondent.

Where a suit for arrears of rent and for ejectment was brought against the registered tenants of a zemindar, and an intervenor appeared and claimed to have purchased the tenure which was alleged to be a permanent transferable one, HELD that the plaintiff, having at first acquiesced in the inclusion of the intervenor as a defendant in the suit, could not rightly in its latest stages question the applicability of the sale-certificate to the land in suit; and that a simple decree for such arrears as were found to be due from the tenure should be passed against the defendant.

A decree for ejectment ought not, in a suit for arrears of rent, to be passed against the holder of a permanent transferable interest.

THIS was a suit for arrears of rent brought against two persons, Bhikaree and Fakiree, who were the registered tenants in the plaintiff's (zemindar's) serishta. One Sreenibash, who is the special appellant in this Court, intervened in this suit, and alleged that the land of which the arrears of rent were claimed by the plaintiff had been sold and purchased by him in execution of a decree. He further alleged that there was no due, and that this was a collusi between the plaintiff and the old t Bhikaree and Fakiree.

Without any objection on the part plaintiff, Sreenibash was made a party suit. The Moonsiff found that the pl claim for arrears of rent was made o passed the following decree: "Th "suit be decreed with costs with inte "the rate of 6 per cent. per annum "this day up to the date of reali "against the defendants, Bhikaree and "ree, and that Sreenibash is not to be e "if he pays the amount of the decree "costs and expenses into Court within "days from the date of the decree."

Against this decree, both the plainti Sreenibash appealed to the Lower App Court. The plaintiff appealed, on the g that, as Sreenibash was not a regi tenant, the Moonsiff was not right in g an option to him to pay up the amount decree, and thus to save the tenure forfeiture.

Sreenibash, the special appellant b me, appealed, on the ground that this te was a transferable tenure, and, therefore Moonsiff was not right in giving a decre ejectment.

The Subordinate Judge first remanded case to the Moonsiff for an inquiry into question whether the tenure was transfer or not.

The Moonsiff, on remand, found upo evidence adduced before him that the te was transferable. But he was of opi that, after the auction-purchase by Sreenib possession had not been taken by him.

Upon the case coming up again before Subordinate Judge, he has decreed the pl iff's appeal, and dismissed that of Sreenib And he has directed that: "That par the decision of the Court below which reference to the payment of money Sreenibash, be reversed."

He further directs: "The lower Co "decree will prevail against Bhikaree "Fakiree alone, and they will be evicte "the decree remains unsatisfied for a fortni "from this date."

Against this decree Sreenibash has p ferred this special appeal.

The judgment of the Subordinate Ju does not appear to me to be very clear. bases his conclusion upon the finding that defendant, Sreenibash, has not shown that sale-certificate which he produced as evide

auction-purchase, related to the land for ich arrears were claimed in this suit.

With reference to the question of transfer-ility of the defendant's tenure, he, it seems me, has concurred in the opinion of the onsiff; but, as I have already observed, this t of the judgment does not seem to me to very clear. But as the Subordinate Judge tinctly says that a certain petition which s before the Moonsiff, containing an admis-n on the part of the plaintiff that this ure was transferable, although it could not found on the record when it came up fore him, was admissible and relevant dence, it is evident that he meant to hold the Moonsiff's finding upon this point. the tenure was transferable, I do not think was right in passing a decree for eject-ent against the tenant. And, therefore, it clear that that part of the decree of the ower Appellate Court must be amended.

Then he has further held that Sreenibash uld not establish before him that this land s purchased by him; or, in other words, at the sale-certificate which was produced him referred to the land for which the rrears were claimed.

I think that this was not one of the uestions in dispute between the parties. When Sreenibash intervened on the allega-ion that he had purchased this property in ecution of a decree, no objection was taken o that statement.

And then, again, when in the decree of the Moonsiff, Sreenibash was allowed an option to pay up the amount of the decree, the plaintiff in his memorandum of appeal before the Subordinate Judge did not object to it upon the ground that Sreenibash was not the auction-purchaser of the tenure in question.

Further, when the Subordinate Judge re-manded the case to the Moonsiff upon the appeal of Sreenibash to try the question whether the tenure was transferable or not, the plaintiff did not object to that order of remand, upon the ground that Sreenibash, not being the auction-purchaser, was not interested in any enquiry into this point. It was at the last stage of the case that this objection was raised and entertained by the Subordinate Judge. I do not think that the plaintiff ever disputed it. Therefore the Subordinate Judge was not right in going into it at the last stage of the case when it came before him. Certainly the sale-certificate standing alone could not prove whether the tenure for which arrears of rent were claimed, was purchased by Sreenibash or not. If the question had been raised in proper time, Sreenibash would have been prepared to prove that fact by evidence. I think from the conduct of the plaintiffs, it is quite clear that they never meant to raise that question. On the other hand, I think they admitted throughout that Sreenibash had purchased this land at auction.

I, therefore, think that the decree of the Lower Appellate Court ought to be reversed, and in lieu thereof a simple decree for arrears of rent found due by the Moonsiff from this tenure should be passed against the defendants with costs and interest at the rate of 6 per cent. per annum from the date of the decree of the first Court to the date of realization.

The costs of this special appeal will be borne by the respondent.

The 31st March 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judges*.

Fraud in Purchase of Decree—Collusion—Jurisdiction—Remedy for Fraud.

Case No. 1378 of 1875.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 31st March 1875, reversing a decision of the Subordinate Judge of that District, dated the 30th September 1874.

Sufeeoollah Sircar (Plaintiff), *Appellant*,

versus

Begum Bibee and others (Defendants), *Respondents*.

Baboo Hem Chunder Banerjee for Appellant.

Baboo Kalee Mohun Dass for Respondents.

Where a wife had colluded with her husband to buy up a decree under which he and others were judgment-debtors, and the husband subsequently sought to establish his claim to the purchase, on the ground that it had really been made with his own money, and the wife pleaded that the husband's fraud had disqualified him: HELD that, as the wife was a partner in the fraud, it gave her no advantage, and that the husband's claim should also be recognized because it exposed the fraud and afforded the only means of doing justice to the other judgment-debtors.

Though a Subordinate Judge may very properly, if he find the subject-matter of a suit to be of the value of less than Rs. 1,000, transfer it for trial to a Moonsiff, yet a Subordinate Judge is empowered under s. 19, Act VI. of 1871, to try causes of any value.

Garth, C.J.—IN this case, the plaintiff, who is the husband of the defendant, prays

for a declaration by the Court that a decree (being No. 4 of 1847 passed by the Principal Sudder Ameen of Moorshedabad), which was purchased in the defendant's name in that year was, in fact, purchased by the plaintiff and with his money.

In this decree, Nilkunt Sircar and others were the judgment-creditors, and the present plaintiff and others were the judgment-debtors. The decree was ostensibly purchased by and conveyed to the plaintiff's wife, the defendant, and she was duly admitted by the Court as the assignee of the decree. She afterwards took proceedings for the purpose of executing the decree against the judgment-debtors, when the plaintiff raised no objection to her doing so, and did not deny her title to the decree. The other judgment-debtors, however, objected that the plaintiff was the real purchaser, and his wife, the defendant, was merely his benameedar. This question being tried in the execution-proceedings, it was decided by the Judge against the judgment-debtors and in favour of the present defendant.

The plaintiff has now instituted this suit for the purpose of establishing his right to the decree, upon the ground that his wife did really effect the purchase in his right, and with his money.

Both the lower Courts have found as a fact that the plaintiff was the real purchaser of the decree; but the defendant, in special appeal, raised two main objections to the suit:

1st.—That the decree sought by the plaintiff is a mere declaratory one, unattended with any consequential relief, and that, therefore, it was entirely in the discretion of the Court to grant it; and that, inasmuch as the plaintiff had been guilty of a fraud in colluding with the defendant to deceive the Court, and cheat the other execution-debtors, the Court, in the exercise of its discretion, ought not to assist him; and

2ndly.—It was argued that, as the value of the subject-matter of the suit was less than Rs. 1,000, it should have been brought in the Moonsiff's Court, and the Subordinate Judge had no jurisdiction to entertain it.

Both these points were decided by the Lower Appellate Court in the defendant's favour, but we think that the Court was wrong in so doing.

As regards the first ground of objection, we are of opinion that, although this is a suit for a declaratory decree, it cannot be said to be unattended with any conseque relief to the plaintiff.

The effect of the execution-proceed in which the present defendant was succ ful, was to subject the plaintiff himsel well as the other judgment-debtors, liability to the defendant for the w amount of the decree; and, therefore, i plaintiff obtains the decree which he s in this suit, the effect will be to relieve and his other co-debtors from all liabili the judgment-debt. If he is the purch and owner of the decree, he represents judgment-creditor, as well as being him one of the judgment-debtors; and co quently the debt would be extinguished.

But even if this were a case, in w the Court had to exercise a discretion to granting the decree, we see every rea why the Court should exercise that dis tion in the plaintiff's favour.

It is true he has been guilty of a fr in the execution-proceedings, but the defe ant was also a party to the fraud; a therefore, as against her, there is no rea why the decree should not be ma Moreover, by affirming the truth, *viz.*, the plaintiff is the real purchaser, the Co has the means, and the only means, of re fying the fraud which has been perpetrat and doing justice to the other judgme debtors, who were the parties really defra ed by the result of the execution-proceedin

With regard to the second objection, is unnecessary for us to go into the qu tion, whether the subject-matter of the s was of the value of Rs. 1,000, because think the Lower Appellate Court was clea wrong on another ground.

The Subordinate Judge is empowered section 19 of Act VI. of 1871 to try caus of any value; and, although he might ve properly, if he had found the value of t subject-matter of the suit to be und Rs. 1,000, have sent it to the Moonsif Court to be tried there, he had clea jurisdiction to try it himself, and the fa that he did so try it, is no ground of err in special appeal.

For these reasons we think that the Distri Judge was wrong in deciding this cas in favour of the defendant; and we, therefor reverse his decision, and declare the plainti to be the real purchaser, and entitled to th benefit of the decree in question; but inasmuc as this suit has become necessary entirel by the plaintiff's own fraudulent conduct we decline to allow him any of the costs o the litigation.

d

The 3rd April 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

ght of Co-sharer to sue separately—Enhancement of Rent.

Cases Nos. 2912 to 2918 of 1875.

ecial Appeal from a decision passed by the First Subordinate Judge of Backergunge, dated the 22nd September 1875, affirming a decision of the Moonsiff of that District, dated the 17th May 1875.

akhal Chunder Roy Chowdhry and others (Plaintiffs), *Appellants,*

versus

Mahtab Khan and others (Defendants), *Respondents.*

Mr. M. Ghose and *Baboo Doorga Mohun Doss* for Appellants.

Baboo Kashee Kant Sen and *Moonshee Serajul Islam* for Respondents.

n a special appeal in which the main question ed was, whether a co-sharer in an undivided estate ld, after service of notice, sue to obtain enhanced ts from his ryots, without having made his co-sharers ties to the suit, the High Court, following the ng in a former suit, in which the right of a co-sharer n ijmalee estate, who receives his rent separately, to for enhancement separately seemed to be laid down, nanded the cases out of which the appeal arose for l on the merits.

THE point for decision in these appeals is, ether a co-sharer in an undivided estate n sue to obtain enhanced rent after notice m the ryots, without having made his -sharers parties to the suit.

The special appeal, as originally put forrd, went further than this, and made no tinction in favour of cases in which all the -sharers had been made parties.

Judging from the various decisions that ve been quoted on either side, the test uld seem to be whether the ryots have en accustomed to pay specific shares of ir rent to specific shareholders, or to pay ir whole rent jointly; in the former case has been ruled by this Court that a suit arrears of rent by one of the co-sharers uld lie, and I think that the decision does t limit the privilege to cases where the -sharers have been made parties to the suit 2 Ben. 289*).

In the cases now before me, it has been found, and the fact does not seem to have been anywhere disputed, that the plaintiffs have been in the habit of receiving their share of the rent from the ryots separately.

And it is argued that, if a suit will, under such circumstances, lie for the original rent, it will also lie for enhancement of that rent.

I am not quite clear myself as to the identity of the two classes of cases, but, as the right of a co-sharer in an ijmalee estate to sue for enhancement without making his other co-sharers parties where the ryots paid rent to him separately seems to be laid down in Gunga Narayan Doss *vs.* Sharoda Mohun Roy, 12 Weekly Reporter 30, I think I ought to follow that ruling, and remand these suits for trial on the merits. Costs to follow the result.

* 21 W. R. (C. R.) 46.

The 3rd April 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Easement—Doorway—Light and Ventilation.

Case No. 1223 of 1875.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Dinagepore, dated the 30th March 1875, affirming a decision of the Moonsiff of Shibgunge, dated the 26th January 1874.

Bunko Beharee Mistree and another (Defendants), *Appellants,*

versus

Meher Chand Mistree and another (Plaintiffs), *Respondents.*

Baboo Rajendro Nath Bose for Appellants.

Baboo Bhuggobutty Churn Ghose for Respondents.

Where a doorway is used as a means of getting air and light, without interfering with the privacy of neighbours, a decree to the effect that the owner has no easement in the land lying outside of the door, does not necessitate the closing of the doorway.

So far as the judgments of the lower Courts go, stating that the defendant has no right of easement over the land which is found to belong to the plaintiff, it seems to me that the Courts are undoubtedly right. But there still remains the question whether it was proper to direct the defendant to shut up his doorway so long as he only uses that doorway as a means of getting more light and air into his house. There is nothing in the law to prevent him from doing that, as

it would not interfere with the privacy of the other parties. What the plaintiff is afraid of is this: that by means of the doorway the defendant may make use of the drain, which he, the plaintiff, has newly constructed upon the land just outside the wall of the defendant. There is no doubt that the defendant is not entitled to do this; but, if he uses his doorway simply for the purpose of getting light and air into his premises, I do not think the plaintiff has a right to have it shut up.

The decree of the lower Court will, therefore, be varied to this extent, so long as the defendant merely uses the doorway as a means of getting light and air into his own premises, he is entitled to keep it open, but he will not be entitled to use it as a means of getting an easement in the shape of a drain over the plaintiff's land. Each party will bear his own costs of this appeal.

The 4th April 1876.

Present:

The Hon'ble E. G. Birch and G. G. Morris, *Judges.*

Appeal—S. 6, Reg. VIII. of 1819.

Case No. 367 of 1875.

Miscellaneous Appeal from an order passed by the Officiating Judge of Dinagepore, dated the 14th August 1875.

Huree Lall Dey Chowdhry and others (Opposite Party), *Appellants,*

versus

Soorja Kanta Acharj Chowdhry (Petitioner), *Respondent.*

Baboo Jadub Chunder Seal for Appellants.

Baboos Mohinee Mohun Roy and *Gopal Chunder Sircar* for Respondent.

From an order passed by a Judge under s. 6, Reg. VIII. of 1819, no appeal lies to the High Court.

Birch, J.—THIS appeal is preferred against a summary order of the District Judge passed under section 6 of Regulation VIII. of 1819, directing the zemindar to accept the security tendered, and to give effect to the transfer without delay.

A preliminary objection has been raised that no appeal lies to this Court from such an order; and we are of opinion that the objection must prevail. The pleader for the appellant has been unable to show us any law which authorizes an appeal from an order under section 6. His argument is that an appeal lies because the Judge used the word 'decreed,' and has drawn order in the form of a decree, directing an injunction should issue. We think the fact of the Judge having dealt with application in this manner does not e the appellant to come up here in a when the law does not provide for an a from an order passed under Regulation of 1819, section 6.

It is then urged by the appellant's pl that, if we are against him on this point should still, under the circumstances of case, exercise the extraordinary po vested in this Court by section 15 of Charter Act. Speaking for myself, I a say that it is not, in my opinion, ope parties when they find that they have ad ed a wrong course, and filed an appeal w no appeal is allowed by law, to turn ro and say that the Court is bound to exercis extraordinary jurisdiction upon this appl tion. As to whether there may be gro for interference under section 15 or not, pronounce no opinion. All that we sa that we decline to treat this petition appeal as an application to us to exer our extraordinary powers under section 1

The appeal is dismissed with costs.

The 5th April 1876.

Present:

The Hon'ble C. Pontifex and W. F. McDonell, *Judges.*

Nature of Tenancy—Right to create Lease Validity of Pottah.

Case No. 737 of 1875.

Special Appeal from a decision passed the Judge of the 24-Pergunnahs, d the 7th January 1875, affirming a d sion of the Second Moonsiff of Salkhi dated the 22nd April 1874.

Bhola Nath Mitter (one of the Defendants) *Appellant,*

versus

Shaikh Kaloo and another (Plaintiffs), *Respondents.*

Baboo Obhoy Churn Bose for Appellant.

Baboo Anund Chunder Ghosal for Respondents.

Where the nature of a tenant's tenancy and the right of his lessor to create it are in question, the genuineness of a pottah does not settle the question; and even where an owner has been receiving rents under a pottah

ted by a predecessor in title, no such receipt can e the lease valid and binding against him as to the re of the tenancy if it were not originally so, s the receipts were signed by him acknowledging nature of the tenant's tenancy.

Pontifex, J.—In this case, one Pran Kisto under, who was malik of the property in stion in this suit, left two sons, Raj Kisto Ottum Kisto, who died, leaving their ther, Heera Monee Dassee, their heir. The endant, appellant, claims to be reversion- heir to the property after the death of era Monee, and he has been recognized as h since the year 1267 by the plaintiff who paid rent to him. The plaintiff claims to entitled to a perpetual mowrosee lease, der a grant made to him by Heera Monee another (but such other had no interest atever in the estate), and his case is that, ing Heera Monee's lifetime, he held the perty under that lease, and that, since era Monee's death in 1267 up to the year 72, he continued to hold under the appel- t at the same rent, and he continued to eive the rents from the ryots. That, in year 1272, he instituted certain rent-suits inst the ryots, and in those suits the endant, appellant, intervened, denying his ht to sue the ryots, and that the rent-suits re dismissed. In consequence of the missal of the rent-suits, the plaintiff insti- ed the present suit for a declaration that is entitled to a mokurruree lease of this ticular property under his pottah. The endant, appellant, denies his title, and nies that Heera Monee had power to ecute a lease which would be binding upon n. An issue was laid down in the first urt as follows: "Is plaintiff's pottah a enuine and *bond-fide* document? Had he lessors power to grant the lease? Can he lease remain valid and binding?" The onsiff found that the lease was so far a nuine and *bond-fide* document that it had en executed by Heera Monee, and that ssession was taken under it. He finds that s a binding and valid document, inasmuch the defendant, appellant, must be taken to ve confirmed the lease by his receipt of rent under it from the year 1267 to the year 1272. He does not come to any express find- ing upon the question whether Heera Monee had power to grant the lease binding the appel- lant; but it is clear to us that there could not have been any evidence before him showing that the lease was a valid and binding lease, for otherwise it would not have been neces- sary for him to rely upon any act of the appellant as confirming the lease. Upon ap- peal to the Judge of the 24-Pergunnahs, the decision of the Moonsiff was upheld and for the same reasons. The learned Judge has not tried the question whether Heera Monee had power, under the circumstances, to grant a valid binding lease, but he has contented himself with holding that, in the present case at least, it was sufficient for the plaintiff to have shown that the lease was executed by Heera Monee, and that the defendant had since 1267 down to 1272 received the same rent as was reserved upon that lease. We think that the whole question to be tried in this suit was whether or not Heera Monee's lease was binding on the appellant; and we think that no receipt of rent by the appel- lant could make that lease valid and binding against him if it was not originally so, unless the receipts were signed by him acknowledg- ing that the plaintiff held a mowrosee pottah. No acknowledgment or admission of that kind appears to have been given or made by the defendant, and as it is admitted by the pleader for the respondent that there is no evidence whatever on the record to show that Heera Monee was entitled to grant this lease as against the appellant, we think that there is no necessity to send the case back for re-trial of that particular point, and that the decree appealed from must be reversed, and the plaintiff's suit must be dismissed with costs of all the Courts.

The 6th April 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Purchase from Party not in Possession.

Case No. 1255 of 1875.

Special Appeal from a decision passed by the Officiating Second Subordinate Judge of Tipperah, dated the 28th April 1875, reversing a decision of the Moonsiff of Nassarnuggur, dated the 30th June 1874.

Bissessur Doss (Plaintiff), *Appellant,*

versus

Joy Kishore Doss and others (Defendants), *Respondents.*

Baboos Aukhil Chunder Sen and *Bharut Chunder Dutt* for Appellant.

Baboo Nullit Chunder Sen for Respondents.

The current of High Court decisions on the question whether a purchaser from a party not in possession is

competent to maintain a suit to recover the land, is in favour of the right to bring a suit.

THE question in this special appeal is whether a purchaser from a party not in possession is competent to maintain a suit to recover the land.

There have been many decisions in this Court in which the point has been more or less fully considered and determined (*vide* cases noted in the margin). These cases are in favour of the plaintiff's right to bring a suit.

11 Weekly Reporter	80—134.	
20	,,	446.
22	,,	99.
23	,,	131, 163, 165.
25	,,	45.

There is one case reported in Weekly Reporter, Volume XXI., page 101, which decides (distinctly no doubt) the other way, and there are one or two others which, though not quite clear on the point, seem to rule it in the same fashion; but, as the current of decisions, and especially of the later ones, is in favour of the right to sue, I think I am justified in following them, without previously referring the question for the authoritative ruling of a Full Bench.

The special appeal is, therefore, allowed, and the case remanded to the Lower Appellate Court for trial on its merits.

The 7th April 1876.

Present:

The Hon'ble F. A. Glover and C. Pontifex, *Judges.*

Ancestral Estate—Assets—Ancestor's Debts—Inventory of Assets—Onus of Proof.

Case No. 351 of 1875.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 18th August 1875, reversing an order of the Subordinate Judge of that District, dated the 8th July 1875.

Joogul Kishore Singh (Decree-holder), *Appellant,*

versus

Kalee Churn Singh and others (Judgment-debtors), *Respondents.*

Mr. R. T. Allan and *Baboo Huree Mohun Chuckerbutty* for Appellant.

Baboo Nil Madhub Sen for Respondents.

Before judgment-debtors can claim exemption from a decree-holder's claim, on the ground that they only received a small sum from their ancestor's e[illegible] that what they have received has been paid in [illegible]tion of their ancestor's debts, they should [illegible] file an inventory of the whole estate descend[illegible] and prove how it has been applied. In a cla[illegible] kind, the onus of proof is on the judgment-[illegible] and, on their failure to sustain it, a presumpt[illegible] in favour of the decree-holder.

Glover, J.—We are of opinion that [illegible] was a sufficient admission on the p[illegible] the respondents as to the receipt of [illegible] from the estate of Hurdyal to relieve [illegible] decree-holder from any further onus s[illegible] It would have been for him in the [illegible] instance to show that assets of the e[illegible] of Hurdyal had come to the respond[illegible] but, as the latter admitted the fact, it [illegible] for them to show on their part that [illegible] they received and what remained in [illegible] hands after payment of any other deb[illegible] their ancestor was no more than the am[illegible] they admit themselves to be liable for, [illegible] Rs. 650.

The Judge has placed upon the de[illegible] holder the burthen of proving that a [illegible] equivalent to the entire amount claime[illegible] him as due under his decree came to [illegible] judgment-debtors by inheritance, and in [illegible] we think he was wrong. The decree-h[illegible] having proved that some assets came to [illegible] heirs, it was for the latter to prove [illegible] amount. Nothing could be easier; [illegible] judgment-debtors had nothing to do b[illegible] present themselves for examination, an[illegible] declare on solemn affirmation that [illegible] received so much and no more, and how [illegible] had applied it. The information was p[illegible]liarly within their own exclusive knowl[illegible] and their depositions would most prob[illegible] have at once disposed of the matter in [illegible] favour. At all events it would have th[illegible] upon the decree-holder a burthen of p[illegible] which it is not in the least likely he c[illegible] have supported.

We think that, before the judgment-deb[illegible] can claim exemption from the balanc[illegible] the decree-holder's claim on the ground [illegible] they only received a comparatively s[illegible] sum from their ancestor's estate, or that [illegible] have already properly paid in satisfac[illegible] of their ancestor's debts what they in [illegible] received, they must come forward and dep[illegible] to the facts. They should file and pr[illegible] an inventory of the whole of the es[illegible] (if any) descended to them from the origi[illegible] debtor, and should prove how it has be[illegible] applied by them. Should they do this, th[illegible] onus will be shifted, and the decree-hol[illegible] have to prove that the amount of his decr[illegible] came to the defendants, and ought still to [illegible]

r hands; that is to say, that the nts have not applied it in payment r debts of the ancestor. If the nts decline to come forward, the may very fairly take into its con- on whether their refusal is not ount to an admission that they can- y the creditor's allegation.

case must go back for further with reference to the above remarks, sts will follow the result.

The 7th April 1876.

Present:

e Hon'ble E. G. Birch and W. F. McDonell, *Judges.*

Right of Way—Right of Access.

Case No. 1307 of 1875.

l Appeal from a decision passed by Judge of the 24-Pergunnahs, dated 3rd June 1875, reversing a decision the First Moonsiff of Diamond Har-, dated the 28th November 1874.

Mohun Mundul and another (two of the Defendants), *Appellants,*

versus

bin Chunder Mookerjee (Plaintiff), *Respondent.*

o Umbica Churn Bose for Appellants.

Ashootosh Mookerjee for Respondent.

s to a rice merchant's granary through a from another man's tank having been obstruct- the obstruction having formed the subject of a ELD that the merchant's right of way included t of access to his granary on the part of those alt with him.

ch, J.—THIS is a suit brought by the iff to remove certain bunds raised by efendants, by which an existing channel en the plaintiff's and defendants' tanks bstructed. The defendants denied any such passage ever existed. The siff found that the plaintiff had failed ve that there ever had been any such ge, and he dismissed the plaintiff's suit. on appeal the Judge took a different of the evidence, and found that there uch a channel, and that it had been used e last thirty years by traders who had ransactions with the plaintiff, and who this channel for the conveyance of the from plaintiff's stores. The Judge accordingly reversed the judgment of the Moonsiff, and by his decree declared the plaintiff's right to pass with his canoes through the defendants' tank.

In special appeal it is contended that if the Judge's view of the evidence is accepted, it does not justify the decree passed. It is said that the plaintiff cannot succeed, because he does not say that he has been accustomed to use the passage himself, but only alleges user by those who traded with him. But on reference to the plaint we find that the plaintiff distinctly states that his canoes passed through the channel. And if this were not so, and if the case were as it has been represented to us, there is no reason why the plaintiff should not succeed in his suit. If he has by long user acquired a right of access to his tank and granary for himself and those who came by that passage to remove the rice which he has to sell, and the defendants have obstructed that passage so as to prevent access to his tank, the plaintiff has a good cause of action. The appeal is dismissed with costs.

The 10th April 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Enhancement of Rent—Declaration of Right.

Case No. 3178 of 1874.

Special Appeal from a decision passed by the Judge of Purneah, dated the 16th September 1874, reversing a decision of the Moonsiff of that District, dated the 19th June 1874.

Shaikh Enaetoollah (Defendant), *Appellant,*

versus

Shaikh Ameer Buksh *alias* Shaikh Moheeoollah (Plaintiff), *Respondent.*

Mr. M. L. Sandel for Appellant.

Baboo Kishen Dyal Roy for Respondent.

Where a Moonsiff, in a suit for enhancement of rent, found that the tenure was not protected from enhancement, but granted a decree for rent at the old rate, because the grounds on which enhancement was claimed had not been established: HELD that, as the Moonsiff was competent to make a declaration between the parties, his finding that the tenure was liable to enhancement although not forming a portion of the first decree, was binding in a second suit for enhancement of rent.

Markby, J.—IN this case it appears that there had been a previous suit between the

same parties, in which, on a claim for past rent at an enhanced rate, the Moonsiff held that the tenure was not protected from enhancement; but finding that the grounds upon which enhancement was claimed were not established, the Moonsiff gave a decree for rent at the old rate.

A second suit is now brought to recover rent at an enhanced rate. The question is whether the finding of the Moonsiff that the tenure is not protected from enhancement is conclusive in the present suit.

The objection taken is that it is not shown that there is, in the decree, any declaration that the tenure is liable to enhancement. In fact the decree is not upon the record.

We are of opinion that this being a question which was properly raised by an issue in the former suit, which issue was expressly decided, and the Moonsiff being competent to make that declaration of right between the parties, although the rent was not enhanced, the declaration is binding whether it be contained in the decree or not.

In a case reported in 20 Weekly Reporter 377, certain declarations of right, contained in a judgment of this Court delivered in a previous suit, were held by the Privy Council to be conclusive, this Court being competent to make them. The decree in that case was not before the Privy Council; it does not appear that the Privy Council thought it necessary; and, in fact, the decree which is in the records of this Court, and which we have examined, contains none of the declarations relied on by the Privy Council: it is simply a decree for costs.

So in the case reported in 25 Weekly Reporter, page 1, the decree in the previous suit, the finding in which was relied on, was not before the Privy Council, nor have we been able to examine it, as it was not a decree of this Court. But we may, with safety, say that the finding relied on was not in the decree, for the suit was dismissed.

We think, therefore, that in a case like the present, the finding on the question of right may be relied on, whether or no it is contained in the decree.

It has been pointed out to us that the District Judge was wrong in remanding the case to the Moonsiff. There is no doubt that he was so. He must decide the case himself upon the appeal. The costs will abide the result.

As the case is remanded, we also think it right to add that the reasons given by the Moonsiff in support of his judgment appear to us to be worthy of the District Judge's attentive consideration. We also thi the Moonsiff has taken the right view effect of the previous litigation. The siff had a right to treat the finding previous suit as showing, at any rate *facie*, that the land, at that time, w compared with the adjoining lands, under-rented; and this is how we under him to treat it.

The 10th April 1876.

Present:

The Hon'ble W. Markby and Romes Chunder Mitter, *Judges.*

Special Appeal—Award of Costs—Cost

Appeal under section 15 of the L Patent, from a decision passed by Hon'ble E. G. Birch, one of the J of this Court, dated the 20th A 1875, in Special Appeal No. 2756 1874.

Futeek Parooee (Defendant), *Appellan*

versus

Mohendro Nath Mojoomdar (Plaintiff) *Respondent.*

Baboo Ashootosh Mookerjee for Appellan

Baboos Hem Chunder Banerjee and *We Kalee Mookerjee* for Respondent.

A special appeal will not lie against any order a costs which it was within the discretion of a C to make; though, as previously ruled by a Full Be the High Court can, in regular appeal, review exercise of the discretion of the lower Court in award of costs.

Markby, J.—THIS was a suit to reco damages for defamation. The matter already been the subject of criminal proce ings. The Subordinate Judge gave plaintiff a decree for nominal damages; b being of opinion that the suit was a ve tious one, directed the plaintiff to pay t costs of the litigation.

The case having come up to this Co on special appeal, Mr. Justice Birch w of opinion that there was no grou upon which he could interfere with th decree for nominal damages, but being o opinion that the plaintiff ought not to hav been made to pay the costs of the suit, se aside the order of the Subordinate Judge as to costs, and directed that the plaintiff should recover the costs of the litigation.

b

ontended before us that, in special this Court cannot interfere with the n of the Courts below, as to costs: , in this case, the award of costs to dant, notwithstanding that the plaint- ned a decree for nominal damages, in the discretion of the Court below. the first point, we are of opinion question is concluded by the deci- the Full Bench reported in 6 Reporter 187. It was there laid at this Court could, in regular appeal, he exercise of the discretion of the ourt as to the award of costs; but special appeal, this Court could not , unless the order made as to costs gal. We have no reason to doubt rule, which has also been approved bay (4 Bom. H. C. R. 41) has been nerally acted on in this Court. The tances in which there is any apparent re from it are in the cases report- 24 Weekly Reporter 69, and 25 Reporter 28; but the Full Bench n does not seem to have been there re- o, and we have no reason to suppose learned Judges intended to question a s authoritatively laid down. We may serve that the attention of Mr. Jus- ch was not called to the Full Bench n when the present case was before On the other hand, quite recently a of this Court, acting on the Full decision, refused to review in special the discretion of the Court below as s.

think that we ought to follow the ench decision, and to hold that a appeal will not lie against any order osts, which it was within the discretion lower Court to make.

herefore, remains to consider whether, decree had been given for nominal es, the Court had a discretion to award o the defendant. We are of opinion had. The Court below thought that, the words complained of had been , the plaintiff was not entitled to damages, and that to bring this suit criminal proceedings had been taken same matter, was vexatious. In sub- , therefore, the defendant succeeded in urt below. Perhaps it would have been , under these circumstances, to have ssed the suit altogether, the Court, in a case, not being bound to award nomi- mages. But we are not aware of any which prevents the Court, if it thinks he suit is a vexatious one, and that no damage has really been sustained, from giving nominal damages to the plaintiff and awarding costs to the defendant. The words of section 187 leave the discretion of the Courts as to costs wholly unlimited; and it would be impossible to say that such an award of costs was illegal.

We, therefore, reverse the order of Mr. Justice Birch, and dismiss the special appeal.

The 10th April 1876.

Present:

The Hon'ble F. A. Glover and W. F. McDonell, *Judges.*

Forfeiture—Ad terrorem Clause—Failure to cultivate.

Case No. 1432 of 1875.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 28th May 1875, affirming a decision of the Officiating Second Subordinate Judge of that District, dated the 19th August 1874.

Golam Ali Chowdhry (Plaintiff), *Appellant,*

versus

Bhosai and others (Defendants), *Respondents.*

Baboos Rash Beharee Ghose and *Doorga Mohun Dass* for Appellant.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondents.

Where it was a condition in the kubooleut that the tenant's holding would be forfeited if he neglected to cultivate the land without reasonable excuse, HELD that the condition could not be regarded as a mere *ad terrorem* clause, since, if it came to the selling up of the tenure for default, it made a great difference to the landlord whether the land had been properly cultivated or not.

Glover, J.—THE Judge does not seem to be right in the decision which he has come to as to the terms of the kubooleut. He holds that the clause regarding forfeiture of the tenure, supposing that the ryots neglected to cultivate the whole of it, was *ad terrorem*, and therefore not intended to be enforced. It appears to us that this is not a clause of this kind. It is very well to say, as the Judge has done, that, supposing the rent to be fixed in perpetuity at the maximum rate at the end of four years, it was immaterial, so far as the zemindar's interest was concerned, whether the land was cultivated or not, inasmuch as the

ryots would have to pay the rent in either case; but this would not be so. Suppose, for instance, that the ryots made default and paid no rent for three years, and the zemindar sued them and obtained a decree, and suppose that the tenants having no means of paying the amount of that decree, the tenure was put up for sale in satisfaction of it, it is quite clear that the value of the property would be vastly different according as the land was wholly cultivated or partly or entirely left waste, and the interest of the zemindar would be very much involved in the question whether the ryots acted up to the terms of the kubooleut and cultivated the land or not. The terms of the kubooleut are clear enough, and we think that the clause was only a reasonable one. But there is one other condition in the lease which the Court below does not seem to have considered. It is true that, under the kubooleut, the tenants were liable to be ejected if, within a certain time, they failed to bring the whole of the tenure under cultivation; but this forfeiture was conditional, on it being shown that the failure arose from some obstacle or neglect on their part; that is to say, there must have been neglect or failure for no reasonable cause on the part of the tenants to bring the land under cultivation, before they could be made liable to the penal clause: and this would be only fair, for it is quite possible that portions of the land were actually unculturable, or at least very difficult of culture, from the fact of their being covered with heavy jungle or with sand. And these questions must be decided in favour of the tenant before there can be any declaration that the clause in the kubooleut is to have no effect and the landlord to have no right of re-entry on his land. It is said that the plaintiff in the plaint does not state that the defendants were guilty of any neglect. So far as precise words go, this, no doubt, is so; but he, plaintiff, speaks generally of his right to re-enter on the land under the terms of the kubooleut, and the defendants distinctly say that whatever land is found to be still uncultivated is not so on account of any neglect of theirs, and that they tried their best but could not bring the whole of the land under cultivation. The issue of neglect was, therefore, distinctly raised by the pleadings, and it ought to have been fixed by the Court of first instance and tried. The plaintiff has a right of re-entry according to the terms of the kubooleut, conditional on the failure of the tenant-defendants to show that whatever portion of land yet remains uncultivated is in state because they had no power to c it, either from the nature of the soil, o the fact of its being covered with jungle. The case must go back to the Appellate Court in order that this iss be raised and tried; and as the defe admit that certain portions of the lan drone and some kanees, are still uncul it will be for them to show why that If they fail to show any sufficient the plaintiff, we think, will be entit re-enter on the property. The costs o appeal will abide the result.

The 10th April 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Justice*, and the Hon'ble C. Pon *Judge*.

Right of Way—Discontinuance of User—Easement.

Appeal from a decision passed by the Hon J. B. Phear, one of the Judges of this C exercising the Original Civil Jurisdic dated the 6th December 1875.

Sham Churn Addy (Plaintiff), *Appella*

versus

Tariny Churn Banerjee (Defendant), *Respondent.*

Messrs. Piffard and *G. H. P. Evans* fo Appellant.

The Advocate-General and *Mr. W. C Bonerjee* for Respondent.

Where a right of way was claimed over some la a door and a *kirkee* which had been bricked up b plaintiff's predecessor some six or eight years be the present claim was made: HELD that the plaintiff failed to establish a 20-years' user of the way under tion 27 of the Limitation Act, and that the discon ance of the user which was caused by the bricki of the wall had the effect of preventing the acquis of the statutory right. A claim to ownership of la quite inconsistent with a claim of right of way ove

Garth, C.J.—THIS is a suit brought the plaintiff for the purpose of establishing right of way for himself and his serva from a public road called Hildaram Bonn jee's Lane, over a piece of ground which called a blind lane, to a kirkee door a privy in the plaintiff's house.

The defendant, whose residence is situat at the end of the blind lane, has built up wall against the plaintiff's kirkee and pri

d

, and also across the entrance from the lane to Hildaram Bonnerjee's Lane, so prevent all access from Hildaram erjee's Lane to the plaintiff's house. It not very clearly appear from the nce to whom the land called the blind belongs. The plaintiff has made an npt to claim one-half of it as his own, the ground, that as it was a road lying een his house and his neighbour's, the mption of law was, that he was entitled e half of it, *usque ad medium filum* of pace between the two houses.

'e think, however, that there is nothing his point.

he supposition that the plaintiff is the er of the soil is quite inconsistent with right of way which he claims in his nt.

is also inconsistent with the plaintiff's title-deeds, which state the blind lane e the boundary of his property; and, lastly, presumption upon which the plaintiff nds his claim is only applicable to a hway and not to a private occupation d, such as the blind lane is alleged to be.

The only question in the case, therefore, is ether the plaintiff is entitled to the right way which he claims in the plaint. He ims it as having been enjoyed by him and predecessors in title for upwards of 20 rs; and the facts are that in the year 55, one Haran Chunder acquired the proty from some people of the name of Sen. this time there existed an old house on site of the present one; and it has been wed that, for some years after his purchase, aran Chunder's servants and the females of family used the blind lane as an access m Hildaram Bonnerjee's Lane to the vy and to the ladies' private apartments the kirkee door.

In the year 1865 the premises were purased from Haran Chunder by Madhub nder Seal, in the name of Cally Churn l.

In August 1866 Madhub Chunder Seal ed; and in the following year, on the 26th ne, Cally Churn Seal conveyed the property the plaintiff, who, in 1871, pulled down the d house and built the present new one on the same site.

It was proved at the trial by two of Haran hunder's sons, and we consider it satisfacorily established, that some time before Haran Chunder sold the house (one of the ons says a year and a half, and the other 3 or 4 years), the doors of the old house, in respect of which the right is now claimed, were purposely bricked up by Haran Chunder on the inside—and the reason of this was that, with regard to the privy, complaints and threats had been made by the Municipal authorities on the ground that the privy was a nuisance; and, with regard to the kirkee door, it appears that a person, who was visiting at the house as a bridegroom, was seriously assaulted at this entrance, and had some noxious acid thrown upon him. This appears to have been considered a disgraceful proceeding, and the owner, in order to prevent any repetition of the offence, had the door bricked up.

From this time till the plaintiff purchased the house no use of the door is proved, but at the time of the purchase, it seems that the partition had been removed, though the plaintiff admits that the marks of the brick wall were visible at the privy door.

In 1871, when the plaintiff built his new house, the new kirkee door was placed nearly, but not quite, in the same position as the old one; but the defendant has not laid much stress on this point, and having regard to the conclusion at which we have arrived, it becomes immaterial.

Upon this state of facts the learned Judge in the Court below has decided, and we consider rightly, that the plaintiff has failed to establish a 20-year user of the way which he claims within the meaning of the 27th section of the Limitation Act, and that the discontinuance of the user, which was caused by the bricking up of the wall, has had the effect of preventing the acquisition of the statutory right.

In the view which we have taken of the case we should have thought it unnecessary to do more than express our acquiescence in the judgment of the Court below and in the reasons for that judgment, were it not that, in the argument before us, which has occupied a considerable time, some confusion appears to have arisen as to the construction of the 27th section, and the meaning of the terms "interruption," "abandonment," and "discontinuance," as applied to the present case.

There was here neither an "interruption" nor an "abandonment" (properly so called) of the easement claimed. The term "interruption" in section 27 means an obstruction or prevention of the user of the easement by some person acting adversely to the person who claims it. The expression is altogether inapplicable to any voluntary discontinuance of the user by the claimant himself. This is abundantly clear from the explanation given in the Act itself.

The term "abandonment," on the other hand, as applied to easements, means generally the voluntary and permanent relinquishment by the dominant owner of a right which he has actually acquired. This will be found satisfactorily explained in Gale on Easements (2nd Edition), page 353, and in the judgment of the Court in Moore *vs.* Ransom, 3 B. and C. 332. In this sense there was no abandonment here; because the plaintiff's right was never actually acquired. It was only in course of acquisition by user at the time when the doors were bricked up.

"Discontinuance" more properly describes what occurred at that time; not a "discontinuance" by adverse obstruction, as the term is somewhat inappropriately used in the explanation to the 27th section, but such a voluntary discontinuance of the user of the easement as prevents the statutory right being acquired.

The reason why such a discontinuance of user defeats the right is, that no one can be said to be in the open enjoyment of an easement, who has purposely, and with the manifest intention of preventing the user of it, created some obstruction of a permanent character, which renders the enjoyment of the easement, so long as the obstruction lasts, impossible. This is very different from the mere non-user for a time of an easement, which the owner might, if he pleased, enjoy during every hour of that time, but which for some good reason he does not care to enjoy; as, for instance, where the owner of a house ceases to use a way to it, because the house is, for the time unoccupied; or where a farmer desists for a time from exercising a right of pasture, because he happens to have no pasturable cattle, or because by reason of drought or some other cause, the herbage is scanty or unwholesome.

What the owner of the house has done in this case is to incapacitate himself by his own act from any possible use or enjoyment of the way in question; and it seems quite impossible to say that, during the time this incapacity continued, he was openly enjoying the easement and claiming a right thereto within the meaning of the 27th section.

It was then suggested by the plaintiff's counsel that, although the statutory right might not have been acquired, there was evidence in the case showing that the easement had been enjoyed for upwards of 20 years previously to the bricking up of the wall, and that the plaintiff was entitled to claim a right by prescription at Common Law, by asking the Court to presume an ancient grant in his favour. Upon l into the case, however, it appears th evidence in favour of any such prescr right is so slight as hardly to justif Court, under any circumstances, in fin the plaintiff upon that ground; but in case there are very cogent reasons fo admitting any claim upon this basis.

In the first place, the plaintiff in his p distinctly founds his claim upon a 20 user; and in conducting his case in the C below, it is admitted that he relied o other ground than the statutory title.

The defendant, therefore, would very rally abstain from cross-examining the p tiff's witnesses, or adducing any evid himself, except for the purpose of defe the claim in the way, and the only way, plaintiff sought to advance it; and he w now be placed in a very unfair positi we were to allow the plaintiff upon ingenious suggestion, which is now mad the first time, to change his position al ther, and rest his case upon a nice p which was never contemplated by either the parties in the Court below.

The Court are, by no means, disposed encourage a contention of this kind, and result is that we entirely agree with judgment of the Court below, and dis the appeal with costs on scale No. 2.

The 12th April 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *C Justice*, and the Hon'ble E. G. Bi *Judge*.

Actionable Wrong—Cause of Action—Quest upon the Merits.

Case No. 1721 of 1875.

Special Appeal from a decision passed the Subordinate Judge of Tirh dated the 23rd April 1874, affirmi a decision of the Moonsiff of Tajpo dated the 30th August 1873.

Edward Dalgleish (Defendant), *Appella*

versus

Jeebun Mahto *alias* Jhaw Mahto and others (Plaintiffs), *Respondents.*

Mr. G. Gregory for Appellant.

Baboo Doorga Doss Dutt for Respondents.

It is not an actionable wrong to dissuade a tenant from paying his rents to his landlord, who can recover them by law.

e question whether a plaintiff has made out a e of action is a question upon the merits. A tiff must stand or fall on the merits of his own , and nothing that a defendant can say can make tter.

arth, C.J.—We are clearly of opinion there is no ground whatever for this , and that the appeal must be allowed. is a very unfortunate thing that the itional Judge should have thought proper emand the case, for it has led to great y and expense to the parties. The nsiff originally decided, and quite right- hat there was no cause of action, and the plaintiffs were premature in bring- their suit. What the plaintiffs complain is, not that they or their tenants have n actually dispossessed by the defendant, that he has dissuaded the tenants from ng rent to them. But this is no action- wrong. Whatever powers of dissua- the defendant may have used, the nts are bound to pay rent to the plain- , and the latter may sue them if they t pay. Unfortunately, however, the litional Judge, not only considered that e was a cause of action, but he sent the back to the Moonsiff with such remarks amounted to a direction to decide the in favour of the plaintiffs; and the nsiff did find for them accordingly. hen the case came on appeal before the ordinate Judge, and he says: "The aintiffs in the present case are in posses- on of their share of the village in suit, d no injury has resulted to them by fendant's alleged interference with their ots, nor are their titles to hold the same opardized; therefore they have no legal ht to move the Court for a declaratory cree. No cause of action as yet has isen to them." So that his opinion was inctly in the defendant's favour. But he says further on: "Since the case as remanded for trial on the merits by Court of competent jurisdiction, I am ound to decide the appeal on its merits:" then he proceeds to decide in the ntiffs' favour.

We think, however, that he has made a great mistake in supposing that the question whether the plaintiffs have made out any cause of action, is not a question *upon the merits*. We consider that we are deciding the case upon its merits in holding that the plaint discloses no cause of action, and that if any averment in the plaint were proved, the plaintiffs would have no right to the declaratory decree which they ask.

Then it is said that some statement which the defendant has made makes the plaintiffs' case better. But the plaintiffs must stand or fall upon the merits of their own claim, and if that cannot be supported, nothing that the defendant may say in answer can make it better.

The appeal will, therefore, be allowed, and the plaintiffs' suit dismissed with costs in all the Courts.

The 13th April 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Mokurrureedar—Indirect Admission of Title.

Case No. 1765 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 11th May 1874, affirming a decision of the Officiating Additional Sudder Moonsiff of that District, dated the 30th June 1873.

Choonee Mahtoon and others (Defendants), *Appellants*,

versus

Chatoo Mahtoon and others (Plaintiffs), *Respondents*.

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Respondents.

Where an auction-purchaser, in a proceeding before a Collector for the purpose of charging an estate, withstands a claim to a mokurruree tenure advanced by a tenant, but does not otherwise subsequently legally question the tenant's title, the presumption arises that that title has been allowed by the auction-purchaser.

Garth, C.J.—We do not think it necessary to call upon the respondents in this case. Both the lower Courts have decided in favour of the plaintiffs, and established their claim as mokurrureedars of this property; and we think that they were quite right. We should be exceedingly sorry to disturb a decision which has proceeded, not upon one or two pieces of evidence alone, but partly upon oral evidence and partly upon a considerable body of documentary evidence which was brought forward in the case. But, of course, we are bound, when objections are made to particular documentary evidence, to enquire into the admissibility of such documents, and see whether

they have been properly received as evidence. Now here we consider that, apart from the oral evidence which was adduced in the case, there are two sets of documents upon which the Courts below appear to have proceeded. In the first place, there are the receipts which the plaintiffs state were given to them from time to time by the putwaris of the zemindar, and those receipts describe them as mokurrureedars. We have, therefore, documents in the plaintiffs' possession given to them by the zemindar's own agents which actually recognize their position as mokurrureedars. This fact, coupled with the other facts of the case—namely, their long possession and payment of rent for so many years (the amount of which has been spoken to by the defendants themselves)—would, we think, quite justify the Courts below in arriving at the decision at which they have arrived.

But besides that, we have carefully examined a roobakaree by the Collector. This appears to have been a proceeding for the purpose of charging the property; and the zemindar, who at that time had purchased the property at auction and the ancestors of the plaintiffs were both parties to it. The plaintiffs' ancestors at that time claimed to be the mokurrureedars; and the auction-purchaser, the zemindar, came in and questioned the plaintiffs' claim. No decision appears to have been come to upon this point; it was not necessary for the purpose the Collector had in view; but it is certain that the plaintiffs' ancestors then claimed to be mokurrureedars. We have, therefore, these facts appearing in the record in a public proceeding, that at that time the plaintiffs' ancestors were making a claim as mokurrureedars, and that the zemindar was withstanding that claim, and yet we find the plaintiff continuing in possession after this time without his title being questioned. It is not conclusive evidence, but at any rate it is some evidence, that at that time the zemindars were conscious that the plaintiffs' ancestors were claiming title as mokurrureedars, and had had their claim, to a certain extent, allowed. If the zemindar wished to dispute that, he ought to have taken steps for that purpose. But instead of that, we find, as we have mentioned above, that the plaintiffs continue in possession, and pay the rent of this property all this time. This fact, coupled with the receipts, makes the plaintiffs' case, in our opinion, an exceedingly strong one. Under these circumstances, we think that the decision of the Lower Appellate Court should be affirmed, and the dismissed with costs.

We ought to mention that there is document about which we have had co able doubt, and that is the copy of a As the evidence is presented to us, not think that this copy-roka was sible: but a very little more would made it so. It is an ancient docume duced from the proper custody, and by a party admitted to have been, at the the zemindar. The only thing wanted proof of the loss of the original; and plaintiff had only been asked, whether searched for the original, and he had that he had, and had not been able to that would have been sufficient to mak copy admissible. But this does not to have been done, and we think th matters stand, the copy of the roka c be considered as evidence. But the documents were, as we have said, suff to justify the Courts below in coming conclusion which they did.

The 19th April 1876.

Present:

The Hon'ble F. A. Glover and W. F. McDonell, *Judges.*

Separation from Joint Estate—Claim ag Separated Co-parcener—Onus of Proof.

Case No. 1434 of 1875.

Special Appeal from a decision passed the Officiating Judge of Jessore, the 22nd April 1875, reversing a sion of the Subordinate Judge of District, dated the 7th July 1874.

Shushee Mohun Pal Chowdhry and ano (two of the Defendants), *Appellants,*

versus

Aukhil Chunder Banerjee and others (Plaintiffs), *Respondents.*

Baboo Rash Beharee Ghose for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

Where a claim is advanced to any interest said to derived from any separation in a joint estate, presumption of law is in favour of the joint estate, the onus of proof of separation is on the party making the claim.

Glover, J.—It appears to us that the only point on which we need give a decision in this case is the one of onus—the objec-

tion as to the lien on the property having been neither raised nor argued in the Courts below.

The Judge says that the onus of proving that Sonatun and his brother Bhagwan were joint in estate is on the defendants, and they have not supported it; that it was for the defendants to prove that there existed a nucleus of joint property from which the disputed tenure could have been purchased, and that this has not been done; that Sonatun held himself out to the world as sole owner, and as such, his rights were sold, and purchased by the plaintiff.

Now, there is, no doubt, a conflict between the decisions in Taruck Chunder Poddar, 19 Weekly Reporter 178, and Bhola Nath Mehtar, 20 Weekly Reporter 65; but there has been a further decision since (22 Weekly Reporter 248) in the case of Gobind Chunder Mookerjee *vs.* Doorga Pershad, in which the ruling in Taruck Chunder Poddar has been affirmed. This was the judgment of an Appeal Bench (the Chief Justice and Mr. Justice Macpherson), and it reversed the decision of Mr. Justice Pontifex, which the Judge refers us to in his decision.

In this case, the last which, so far as we are aware, has been decided, the whole question was thoroughly gone into, and the various decisions considered. It followed, indeed, the decision in Taruck Chunder Poddar's case, but was more fully given. As I was one of the Judges who took part in the (Taruck Poddar's) case, I can only say now that I maintain the opinion then expressed that the presumption of law is in favour of the joint estate, and that it is for the party claiming an interest derived from separation to prove that the property was separately acquired.

In Taruck's case, Sir Richard Couch said: "There is no doubt a conflict of decisions in "this Court upon this subject. I can see no "way of reconciling them. We must follow "what has been laid down by the Court of "Appeal from this Court."

We think so too, and hold that notwithstanding the conflicting rulings which we have mentioned, and others which have been quoted to us, and which are to be found in the other decisions of the late Chief Justice, we are bound to consider the question as having been settled by the Superior Court of Appeal, and that we neither can (as has been suggested) nor ought to refer this case to a Full Bench.

Our opinion is that the case should be remanded to the Judge to try it *de novo*, giving the defendant the benefit of the presumption, and calling upon the plaintiff to rebut that presumption before deciding that the property was Sonatun's sole acquired estate.

Costs to follow the result.

The 19th April 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Right of Way—Private Road.

Case No. 1572 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 6th May 1875, reversing a decision of the Moonsiff of Fenchoogunge, dated the 31st December 1874.

Sham Soonder Bhuttacharjee (one of the Defendants), *Appellant,*

versus

Monee Ram Doss (Plaintiff), *Respondent.*

Baboo Joy Gobind Shome for Appellant.

Baboo Bama Churn Banerjee for Respondent.

Where there is a road, the privilege of using which is enjoyed only by one particular section of a community, it is absurd to say that the road is a public one.

I SEE no reason for interfering in this case.

The Court below has found on the evidence, in the first place, that the road was a private one; and, secondly, that the plaintiff has used it as of right for more than twenty years by passing through it with his men and cattle.

It is now urged in special appeal that the Subordinate Judge is wrong in finding that the road is a private one, and that, on the evidence, he ought to have found that it was a public road. It is not very easy to see what advantage the special appellant, who is the defendant in the case, can derive from the fact that the road was a public one, other than that of preventing the plaintiff from bringing a suit in the Civil Court. The reason why it is said that the Judge ought to have held the road to be a public road, is that he has found on the evidence that the residents of two or three neighbouring villages use it for the passage of themselves

and cattle. And it is argued that the fact of the inhabitants of two or three villages using it makes the road a public one. If the finding had stopped there, there might have been something in this argument; but unfortunately for the appellant, the Judge goes on to find that the road is solely used by men of these particular villages, and that the residents of other villages have no right, and, as a matter of fact, are not allowed to use it. Where there is a road, the privilege to use which is enjoyed only by one particular section of a community, it is absurd to say that *that* road is a public one. It is to all intents and purposes a private road, although the number of the people who have the privilege of using it may be great.

The appeal is dismissed with costs.

The 20th April 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble E. G. Birch, *Judge*.

Adjusted Account—Declaratory Decree—Special Appeal.

Case No. 2228 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 30th July 1874, reversing a decision of the Sudder Moonsiff of that District, dated the 9th February 1874.

Buldeo Sing and others (Defendants), *Appellants*,

versus

Ram Surun Lall (Plaintiff), *Respondent*.

Mr. Younan for Appellants.

Baboo Boido Nath Dutt for Respondent.

Where, on an adjusted account between two parties, one claims from the other some money and some grain which are shown to be due to him, and obtains a decree for the same, the decree is not a declaratory decree, and a special appeal does not lie from it to the High Court under s. 27, Act XXIII. of 1861.

Garth, C.J.—We think that the objection taken for the respondent that, under section 27 of Act XXIII. of 1861, no special appeal lies to this Court, ought to prevail. The plaint does not, as it has been contended, ask for a declaratory decree. It is true that it is in a form which we disapprove, and we have expressed our disapproval in the strongest terms; for we consider that all plaints ought to be framed in such a simple and intelligible form as to bear two meanings. But, in substance, the plaint in this case amounts to this, that the defendant has, under the circumstances mentioned in the plaint, received certain sums of money, and a certain quantity of grain, and that an account has been adjusted, as the plaintiff alleges, between him and the defendant, by which a certain portion of the grain and money is admitted to be his property; and what he, in reality, asks the Court to do is to order the grain and money which is admitted to be his property to be made over to him. We think it should be encouraging the framing of plaints in unusual and circuitous forms, for the purpose of evading the law relating to Small Cause suits, if we were to hold that the plaint is any other than what, in substance, we consider it to be, namely, a claim to recover so much money and so much grain which clearly might have been enforced in a Small Cause Court. That being so, we think that the objection should be allowed and the appeal dismissed with costs.

The 20th April 1876.

Present:

The Hon'ble F. A. Glover, *Judge*.

Expiry of Lease—Continuous Holding.

Case No. 1523 of 1875.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Chittagong, dated the 3rd February 1875, reversing a decision of the Moonsiff of Sadikoond, dated the 22nd August 1874.

Sreemutty Altab Bibee (Plaintiff), *Appellant*,

versus

Joogul Mundul (Defendant), *Respondent*.

Baboo Aukhil Chunder Sen for Appellant.

Baboo Roop Nath Banerjee for Respondent.

Where a tenant, who has a lease for one year, holds over after the expiry of his lease, and is not in the position of a trespasser, it must be presumed that he has continued to hold on the same terms as those on which he held in the first year of his term.

It appears to me that the judgment of the Court below must be altered to this extent, namely, that the plaintiff must be declared to be entitled to the rent of the three years which he claimed. It would be altogether inequitable that, because the defendant holding

under a kubooleut, the term of which was one year, chooses to retain possession of the land for two years more, he should pay nothing for the two years after the expiry of his kubooleut, on the ground, as the Subordinate Judge has put it, that the contract between the parties had expired. It must be presumed, where a person holds over in this way, that he holds for succeeding years upon the same terms that he held in the first year of his term. There is no allegation in this case that the defendant is in the position of a trespasser. It is not denied that he is still holding possession of the land under the plaintiff; his possession therefore is not adverse to him. Therefore whether you call it rent or money for use and occupation of the land, the plaintiff is equally entitled, it seems to me, to recover. The other question as to the right of the plaintiff to eject the defendant has been abandoned by the pleader for the special appellant at the hearing.

The order, therefore, will be that the Subordinate Judge's decision is modified to this extent, that in lieu of the decree for the rent of one year, the plaintiff will get a decree for the rent of the three years which he claimed. Under the circumstances, each party will pay his own costs of this appeal.

The 10th February 1876.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Adoption—Guardian's Evidence—Right to adopt—Defects in Evidence.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Jumoona Dassya Chowdhrain

versus

Bamasoondari Dassya Chowdhrain.

Where a Hindoo widow had adopted a son in pursuance of an authorization to adopt, which was alleged to have been executed by her late husband, and her mother-in-law sued to set aside the adoption as invalid, and the case turned entirely upon the genuineness of the authorization, the Privy Council, in consideration of the nature of the suit, which would destroy not merely the title but also the civil status of the adopted son, and in consideration of the obligation which lay on the plaintiff to give her own evidence in support of her suit, declined, in the absence of any such evidence from plaintiff, to set aside the Calcutta High Court's decision in favour of the defendant. The legal prohibition against a disqualified proprietor's making an adoption without the consent of his guardian extends to an authorization to adopt, but is confined to the proprietors of estates under the Court of Wards, and does not apply to other proprietors who have attained to the age of discretion.

Defects in evidence relating to the execution of a deed authorizing adoption, where the intention to grant such authority has been proved or may be assumed, are less material than defects in evidence relating to benefits conferred on various persons in the disposition of a property by will.

THIS is an appeal against the decree of the High Court of Calcutta, which, reversing a decree of the Subordinate Judge of Zillah Rajshahye, dismissed the plaintiff's suit.

The suit was brought by a Hindoo widow, Jumoona Dassya, against her daughter-in-law, Bamasoondari Dassya, who was sued in her own right, and also as the guardian of Giris Chunder Moozoomdar, whom she had adopted under an authority alleged to have been executed by her deceased husband. The object of the suit, which may be taken to be a suit between Jumoona Dassya and the infant adopted, was to set aside that adoption, and to have it declared invalid. Jumoona was the widow of Guru Pershad, who died in the year 1851. He left, besides his widow, two sons, Govind Chunder and Gopal Chunder, and three daughters. On his death-bed he executed a wasiutnama, the effect of which was to constitute his widow the guardian of the two sons, and manager of his property during their minorities, with a direction that, on their attaining majority, the elder should take a nine-annas' share, and the younger only a seven-annas' share of his estate. Govind Chunder, the eldest son, died in the year 1853. He had, according to the custom of Hindoos, been married in his father's lifetime, whilst yet a child of tender years, to another child some years younger than himself. It is alleged on the part of the defendants that on his death-bed, the day before his death, he executed a document, authorizing his widow to adopt a son; and the truth of this allegation is the principal question in the cause.

If the adoption stands good, the adopted son is not only entitled as actual possessor to the share of Govind Chunder, his adoptive father; but upon the death of Jumoona, will, if then living, become entitled to take the share of the other brother, who died unmarried, and whilst still a child, in preference of the sisters of his father. On the other hand, if the adoption is invalid, Jumoona, if she survives Bamasoondari, will

* From the judgment of Kemp and Pontifex, JJ., decided on the 14th February 1873.

become entitled on the death of the latter to the share of her eldest son.

This contingent interest is the only *locus standi* which she has in the present suit; although the desire to strengthen the future and contingent claims of her daughters may have been an additional motive for bringing it.

Various questions were raised in the suit which are now of no moment. The only substantial issues are, *first*, whether Govind Chunder did execute the alleged authority to adopt; and, *secondly*, if he did so, whether he was by reason of his age capable of executing such a document.

Their Lordships think it will be desirable, in the first place, to come to a clear conclusion upon a question which has been very much disputed in the cause, namely, the age of Govind Chunder at the time of his death, because it is one which bears upon both the issues to be now determined. It bears of course directly upon the latter of them, and it bears indirectly upon the former, inasmuch as the older Govind Chunder was, the more probable is it, that he would desire to execute such a document as that in question.

The contention in the present suit is, that although Bamasoondari was, at the time of her husband's death, 11 or 12 years old, he was only between 13 and 14; that there was not a difference of more than two years between them. That there can be any doubt now as to the age of Bamasoondari, is, their Lordships think, impossible. It is true that, immediately after her son's death, Jumoona, in a report made to the Collector, appears to have stated that her daughter-in-law was not more than eight or nine years old, and that the age of her son was 12 years, admitting, therefore, that there was a difference of three or four years between them. In a subsequent proceeding, that is, in her written statement filed in the Act IV. case in 1854, she expressly stated that the age of her son was greater by four years than that of the plaintiff. Hence, we have a clear admission on her part that there was a difference of some four years between the ages of Bamasoondari and her husband, although she may have sought to make them both younger than they really were by throwing back the age of the former to eight or nine years. The question, however, of Bamasoondari's age was solemnly tried and determined between her and her mother-in-law in the suit of 1860. The horoscope of Bamasoondari was then produced, and the finding of the Judge made it perfectly clear that she must have been, at her band's death, of the age of 11 or 12 The result of that suit, no doubt, has the *consensus* of the witnesses on both in the present suit as to the age of soondari. But the effect of the adm of Jumoona remains, and there is no why we should come to any conclusion than that the difference of age be Bamasoondari and her husband was which was originally stated. Their L ships, moreover, think there is great fo the observations of Mr. Justice Ke Judge admittedly of large experience native usages and customs upon this He thinks that Hindoo marriages are u arranged so that there is a difference of siderably more than one or two years bet the age of the husband and wife; and Lordships think this is probable and re able. The foundation upon which mar between infants, which so many philo cal Hindoos consider one of the most tionable of their customs, is the rel obligation which is supposed to lie parents of providing for their daughter soon as she is *matura viro*, a husband able of procreating children; the c being that when that period arrives, infant wife permanently quits her fa house, to which she had returned after celebration of the marriage ceremony, that of her husband. Therefore, it is expected, both for physical and reasons, that marriages should be arra so that the husband, when called upo receive his wife for permanent cohabit should have attained the full age of ad cence, and also the age which the law as that of discretion.

Their Lordships, therefore, upon the dence, have no difficulty in coming to conclusion that Govind Chunder was, at time of his death, of the age of 15 or and, therefore, of an age which, accord to the law prevalent in Bengal, is to regarded as the age of discretion.

Their Lordships will now proceed to c sider the question as to the *factum* of t instrument.

The story told by Bharut Chunder Roy, father of Bamasoondari, and therefore t most important witness on that side, is effect this, that the day before the execut of the instrument he had a conversation wi Govind, and represented that he ought t execute a deed of permission to adopt a son; that Govind assented to this; that the wi- ness afterwards communicated what had so

passed to Jumoona; and that she finally said, "Then, my child, write and give permission to adopt a son." A good deal of criticism has been applied to the reasons for giving a power to adopt which Bharut Chunder says he assigned on this occasion. Their Lordships think that the more plausible construction to be put on what he swears he then said is, that he had had in view the supposed spiritual advantages which his daughter might derive from having an adopted son; advantages which seem to be considered of some value, though not perhaps of the same value that they are to an adoptive father. It is then sworn that on that day the draft of the deed of permission was begun, but that it was not finally finished until the next day. There is some obscurity as to the preparation of this draft, and the actual giving of instructions for it by Govind Chunder. And if this were a case in which a will was propounded, giving benefits to various parties and making a disposition of property, as to which it would be necessary to satisfy the Court that the testator fully knew what he was about, the evidence would be extremely defective. But when the question is only as to the mode of carrying out a permission to adopt, to which the party had signified his assent, the defect in the evidence becomes less material. It is, however, an observation that may fairly be made for the plaintiff that there is not such satisfactory evidence as to this draft as their Lordships might expect to find. The lapse of time since the transaction may in some degree account for this. According to the case for the defendants this draft was fair-copied on the day preceding the death of Govind Chunder, upon a stamped paper purchased on that day at Nattore, a place which appears to be at the distance of 10 or 12 miles from the family-house where the deed was executed. This fair copy is said to have been made by a person other than the person who wrote the draft. The latter is said by some of the witnesses to have been one Bagchi, and the writer of the fair copy is said by all the witnesses who depose in favour of the instrument to have been Ramnarain Sircar.

Bharut Chunder further states that this fair copy was executed by Govind Chunder, and that Jumoona then went into the inner apartments, and brought out Bamasoondari, to whom the completed instrument was delivered by Govind Chunder. The witnesses for the plaintiff, on the other hand, whilst they contend that no such transaction ever took place, assert that Govind Chunder was, on that day, speechless and incapable of doing what he is said to have done; that Bamasoondari was not in the house, but was then living at her father's house; and that, although sent for, she was unable to come for want of a palki.

In this conflict of evidence, their Lordships are not able to form a confident opinion as to the credibility of one set of witnesses as opposed to the other; and they have not, in this cause, the advantage of having a clear expression of opinion by the Judge of first instance as to the demeanour, and consequent credibility, of those witnesses when produced before him. His judgment, which was in favour of the plaintiff, proceeds first upon the assumption that it was impossible to purchase the stamped paper at Nattore, and to have the deed engrossed and executed upon the same day; next, upon the general improbability of the transaction; and further upon certain appearances upon the document in connection with the signatures of Ramnarain Sircar and other subscribing witnesses. He, no doubt, also intimates his belief in the testimony given for the plaintiff to the effect that, on the day in question, Govind Chunder was speechless.

The learned Judges of the High Court have dealt with two of the above points. They seem to have satisfied themselves, and their Lordships are not prepared to impugn their conclusion, that the stamped paper on which the document propounded is written, might, though purchased on the morning of the day of execution, have reached the house in time to have the document engrossed and executed, as it is said to have been engrossed and executed. They, having the original before them, were further of opinion that the appearances which have been referred to, were not such as to excite any grave suspicion touching the genuineness of the document. They also, with better means of judging than their Lordships can have, came to the conclusion that the witnesses for the defendant were of a more respectable and independent class than the witnesses produced by the plaintiff.

There are two disputed facts relating to the transaction which, if established, would go far to prove the defendant's case. The first is the presence of Bamasoondari. Their Lordships agree with the High Court in thinking that the story told by the plaintiff's witnesses in order to account for the

alleged absence of Bamasoondari is anything but satisfactory. The young man is shown to have been ill for several days. It is sworn on the other side that Bamasoondari was living in her husband's house, and had been there a month at least, or two months, previous to his death. Her age renders that probable; but even if from any accidental cause she happened, when her husband was taken ill, to have been at her father's house, their Lordships think that the suggested want of conveyance, considering the apparent position of the family, is wholly improbable, and a story which the learned Judges of the High Court were justified in disbelieving. They, therefore, believe that Bamasoondari was present on that occasion; and that is a fact which necessarily affects most materially the credit due to the plaintiff's witnesses.

Then, again, there is the alleged concurrence of Jumoona. Jumoona has not been examined as a witness in this cause. The reason why she was not examined can hardly be the prejudice of natives of position to appear as witnesses, since she produced as her witnesses upon the point of Govind's age her own daughters. She was the most important witness in her own case, both upon the point of the age of her son, and upon her alleged consent to the execution of the document. That the document, if executed at all, should have been executed without her consent, is, their Lordships think, in the highest degree improbable. It is well known what the position of a mother in a Hindoo family is; what influence, although she may not be concerned at all in the management of the property, she exercises over the family; what respect is paid to her opinion. Nor is the influence of a mother likely to be least when her son, a youth, is dying in the house. Then, again, the relation of this lady to Govind was not merely that of a Hindoo mother to her son. She was, under the will of her husband, invested with the management of the property during the minority of her son, who was still, in law, a minor. In fact, to all intents and purposes she must have been at that time the mistress of the house. Her alleged concurrence was thus a point which it was most material for her to contradict by her own testimony given in the cause, and subject to the test of cross-examination.

Their Lordships, in making this observation, are not insensible to the nature of the suit. It is one in which she, upon a remote and contingent interest, an interest which will probably never accrue to her, c into Court, not only to destroy the t a person in possession of an estate, destroy his civil *status;* and therefo more than ordinary burden of proof upon her.

A good deal has been said as to took place after Govind Chunder's d It is perfectly clear that the existenc this document was asserted by B soondari and those who acted for he early as 1854, when she made an app tion under the Act of 1841. After she tried to get possession of her husb share of the property; and an Act proceeding was commenced in the month of August 1854. From the sche of deeds which forms part of the proc ings in that case, it appears that the d ment was then actually produced and in Court. On the other hand, Jum seems then, and indeed from the tim which she made her report of her death to the Collector, persistently to disputed the existence of a valid auth to adopt. If, therefore, she really concu in the alleged transaction, there must been a subsequent quarrel very shortly Govind's death. Originally Bharut Chu and she must have been upon good te since she is expressly enjoined by husband's wasiutnama to have regar his experience, and to consult him all matters of importance. It is not probable that a rupture took place w at his instigation or under his influe his daughter first asserted her right to possession of her husband's share of property, which she clearly did be August 1854, and that thereupon mother determined to set her face agai the alleged right to adopt. But if honestly repudiated the document, there no evidence of a quarrel, and that is circumstance in favour of her. Weigh the whole evidence as to the executio this document, and considering how portant the testimony of Jumoona was, that in omitting to give it she has at le failed to produce the best evidence in power in support of her own case, the Lordships are of opinion that they have n sufficient grounds, whatever doubts the may entertain as to certain parts of the evidence for the defendant, for interfering with the finding of the High Court. They desire to state that in coming to that conclusion they do not rely upon the evidence

is suit derived her title under an ex- grant from the Government to her nd, a Brahmin, whom she succeeded ress at-law. If, upon her death, there been any heirs of her husband, those must have been ascertained by the iples of the Hindoo Law; but, by on of the prevalence of a state of law e mofussil which renders the ascer- ment of the heirs to take on the death n owner of property a question sub- ially dependent on the *status* of that er. Thus the property being originally remaining alienable might have passed ets *inter vivos* in succession to British ject, to foreign European owner, to enian, to Jew, to Hindoo, to Mahome- , to Parsee, or to any other person, ever his race, religion, or country ording to the law administered by the vincial Courts of British India, on the th of any owner being absolute owner, question touching the inheritance from of his property is determinable in a nner personal to the last owner. This tem is made the rule for Hindoos and homedans by positive regulation; in er cases it rests upon the course of judi- decisions." And the final conclusion of Committee was this: "Their Lordships' nion is in favour of the general right of Crown to take, by escheat, the land of a ndoo subject, though a Brahmin, dying hout heirs; and they think that the claim the appellant to the zemindari in estion (subject or not subject to a trust) ght to prevail, unless it has been abso- ely, or to the extent of a valid and sub- ting charge, defeated by the acts of the dow Lutchmedavamah in her lifetime. the latter case the Government will, of urse, be entitled to the property, subject the charge." In a subsequent case ting to the same estate, and reported in 11th Moore's I. A., p. 619, the question between the Collector, representing the ernment, and a person claiming to have lid and subsisting charge by an act of widow—a charge which the widow was petent to create; and it was held that Government took subject to the charge, d the suit was dismissed, but without ejudice to the right of the Collector, as presenting the Crown, to redeem the arge and recover the estate. The property, doubt, in this case was a zemindari; but e decision seems to establish the principle at, where there is a failure of heirs, the rown, by the general prerogative, will take the property by escheat, but will take it subject to any trusts or charges affecting it. There, therefore, seems to be nothing in the nature of the tenure which should prevent the Crown from so taking a mokurruree, subject to the payment of the rent reserved upon it.

It has been argued, however, that this mokurruree, not being an independent zemindari, but being carved out of a zemindari, stands upon a peculiar footing, and that, upon the failure of heirs, the zemindar takes by right of reversion, or, if not strictly by right of reversion, that the tenure escheats to him as the superior lord, rather than to the Crown. The mokurruree was clearly an absolute interest. It was also an alienable interest. It might have been seized and sold, as Mr. Doyne has shown, under Act X. of 1859, even in a suit for rent. It could not have been forfeited for the non-payment of rent; for, in such a case, the zemindar could only have caused it to be seized, put up for sale, and sold to the highest bidder. It is, therefore, property which, like that in the case above cited, might have passed to any purchaser, whatever his nationality, or by whatever law he was to be governed. It cannot, their Lordships think, be successfully argued that, having so passed, the estate would have determined upon the death of Shurfoonissa (supposing it had been sold in her lifetime) without heirs; for the grant contains no provision for the lessee of the estate created in such event. There seems, therefore, to be no ground for saying that the lands have reverted in the proper sense of the term to the zemindar; and the only question is, whether, on the failure of heirs of the last possessor, he is entitled to take a tenure subordinate to, and carved out of, his zemindari by escheat.

Their Lordships are of opinion that there is no authority upon which the power of taking by escheat can be attributed to the zemindar. The principles of English feudal law are clearly inapplicable to a Hindoo zemindar. On the other hand, it is clear that, if the zemindar has not such a right, the general right of the Crown subsists and must prevail.

On the whole, therefore, their Lordships think that the High Court have come to a correct conclusion in holding that, supposing the parties in possession have nothing but their possession to depend upon (a question on which their Lordships give no opinion), the superior title, under which alone they

can be ousted from possession of the lands, is not in the zemindar or his representatives, but in the Crown. They will, therefore, humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

The 10th March 1876.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Re-formation of Chur—Alluvion—Right of Original Owner.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Rani Sarat Sundari Debya and another

versus

Soorjya Kant Acharjya and another.

Where land re-forms by alluvion on a site capable of identification, the right of the owner of the original site to the chur is indisputable.

In this case the respondents were plaintiffs, and they sought to recover, from the appellants who were defendants, possession of certain chur land thrown up by the river Jamoona, which we may take to be accurately described upon the Ameen's map, and to be that which has been throughout the proceedings called "C." The title which the plaintiffs sought to establish was that this land had, in consequence of the recession of the river Jumoona, and by gradual accretion, become part of the village of Juggutpoora, which forms part of his zemindari.

The former history of the land appears to be this: Some time before 1851 or 1852, a certain chur, which the defendants say was upon the same site as the existing "C," was thrown up by the river. We may call this the original "C." Of the anterior history of the site there is not much evidence; but it is certainly probable that the river, which seems to be of a peculiarly unruly character, had formerly diluviated the lands of the defendants, and that the original "C" was a re-formation upon what had previously been their land. But, however that may be, it is perfectly clear that, in the thakbust proceedings of 1852 or 1853, this original "C" was treated as the land of the defendants, and was designated Mouzah Soosooa. It further appears that these proceedi[illegible] not take place behind the back of [illegible] whom the present plaintiffs represe[illegible] that there was an application and a p[illegible] ing before the Collector for the recti[illegible] of the boundary of this Mouzah Soos[illegible] at first demarcated. That proceeding[illegible] forth at page 68 of the record; and l[illegible] at it and at the map, their Lordship[illegible] ceive that at that angle in the thakbus[illegible] of Mouzah Soosooa which lies be[illegible] Nos. 35 and 37, the thakbust office[illegible] originally included a certain small c[illegible] the mouzah, and that, upon an a-pli[illegible] to the Collector, both parties being p[illegible] before him, the boundary was recti[illegible] giving that small chur to Juggutpoora, [illegible] making the coloured river, as it now st[illegible] form the eastern boundary of Mo[illegible] Soosooa, from No. 35 to No. 49.

Now, can it be doubted that, if this ori[illegible] "C" had never been submerged agai[illegible] defendants would have had a perfectly [illegible] title to it as against the plaintiff, and [illegible] bably as against all the world? It, how[illegible] appears that the river, after travelling t[illegible] east, travelled back again to the west, [illegible] viating the original "C," and then div[illegible] at one point into two channels, threw up [illegible] churs which are marked in the map as [illegible] and "B;" that, some little time afterw[illegible] the existing "C" appeared; that the def[illegible] ants took possession of it, and have [illegible] since been in possession. This must [illegible] taken place some time between 1861 [illegible] 1865, for in the latter year the defend[illegible] claimed "A" and "B," treating them a[illegible] accretion to "C," but failed in that suit. T[illegible] was at that time, as clearly appears from [illegible] final judgment of the High Court, a de[illegible] channel, though not the main channel of [illegible] river, between "C" and "A" and [illegible] which formed the eastern boundary of [illegible] and the western boundary of "B." [illegible] result of that suit was that "A" and [illegible] fell to Juggutpoora; and nothing more [illegible] done till the year 1870, the defend[illegible] remaining in possession of "C."

One point taken by Mr. Bompas is t[illegible] the defendants never acquired a perman[illegible] title to the original "C;" or, at all eve[illegible] that, when that chur was again washed a[illegible] by the river, it fell into the domain of [illegible] Crown or State; and, therefore, that t[illegible] defendants cannot claim the existing "C[illegible] as a re-formation on their land; but that t[illegible] title to it must be determined by the law of [illegible] gradual accretion. Their Lordships cann[illegible] accede to this argument. They conceive

* From the judgment of Kemp and Glover, JJ., decided on the 17th April 1873.

the existing "C" can be identified as rmation on the site of the original at was demarcated as Mouzah Soosooa , the general law must prevail. It known that, as to that general law, as been some doubt and confusion in rts of India; and that, notwithstand- decision of this Board in the case of mut Imam Bandi *vs.* Hurgovind Ghose, oore's I. A. 403, the Indian decisions en conflicting upon this point, the right le having been laid down by a Full of the High Court presided over by rnes Peacock, although subsequently rmed by another Full Bench of the Court. Until the law was finally set by this Committee, it cannot be said to een well settled in the Courts of India, ere are traces of this uncertainty and sion in the earlier proceedings set out present record. It is now, however, ted that the case of Lopez *vs.* Muddun n Thakoor, 13th Moore's I. A., p. 472, e subsequent decisions of this Board govern the present question, so that, if the present defendants were plaintiffs cause, and could make out that the claimed was a re-formation upon land had belonged to them, they would be d to recover it from a party in posses-

fortiori they are entitled to defend their ssion against a party who sets up against the law of gradual accretion.

e case seems to have been very well in the Court of first instance, and the come out much more clearly than in chur cases they generally do. The n who made the local investigation to the conclusion, upon grounds which r to their Lordships to be satisfactory, his new "C" was a re-formation upon te of the original "C;" and the Zillah t, acting upon that, dismissed the suit, ng a decree in favour of the defendants. cause then went to the High Court, and Court, throwing some discredit on the t of the Ameen, came to the conclusion, by gradual and imperceptible accretion by virtue of the law relating to such tion, "C" had become an adjunct to mpoora. To their Lordships it appears nothing which is said in the judgment of High Court substantially affects the cre- due to the report of the Ameen; and think that, in cases of this kind, it is ys desirable, if possible, to give effect to local investigation made by an experi- d officer upon a view of the place. One material finding of the Ameen is this: he was asked to say "whether it was true that, "when the chur, now the land in dispute, "formed, there were deep and flowing *sotas* "of the river Jamoona, both on the east and "west of it;" and he finds that, "while there "was deep water flowing on the east and "west of the disputed land, the disputed "land began to form, as has been mentioned "above."

In the teeth of this finding it is difficult, if not impossible, to say that the existing "C" was an accretion, in the proper sense of the term, to "B." And, on the other hand, the investigation of the Ameen, and the measurements which he made, seem clearly to establish that the greater portion of the land in question has re-formed upon a site capable of being identified as the site of the Mouzah Soosooa, which was the subject of the thakbust proceedings in 1852.

In these circumstances, their Lordships think that the judgment of the lower Court was the right judgment, and they must humbly advise Her Majesty to reverse the judgment of the High Court, and in lieu thereof to make an order, dismissing the appeal, to the High Court, with costs in that Court, and affirming the judgment of the Zillah Court. The appellants must also have the costs of this appeal.

The 10th April 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt., Chief Justice*, and the Hon'ble C. Pontifex, *Judge.*

Sale of a Tea Estate—Mortgage—Priority of Lien—Advances.

Appeal from a decision passed by the Hon'ble A. G. Macpherson, one of the Judges of this Court, exercising the Original Civil Jurisdiction, dated the 7th September 1875.

L. P. D. Broughton (Defendant), *Appellant,*

versus

W. Spink and others (Plaintiffs), *Respondents.*

Mr. C. C. Macrae for Appellant.

Mr. Jackson for Respondents.

Where a firm had purchased a moiety in a tea estate, and engaged to pay all its working expenses, on the

condition that the purchase-money should be a charge on the estate and be repaid from its produce before any profits were declared, and that the working expenses should be repayable in the same manner as the purchase-money of the moiety, HELD that the firm had a charge upon the original owner's moiety in priority to a Bank mortgage which had been effected on it after the conveyance of the first moiety to the purchasing firm.

On a question arising as to the price at which the firm should secure the whole property, HELD, also, that the original owner's moiety should be purchased at the price at which the Bank's surveyor had valued it, and not at the market-value at the time of the purchase, because, the original owner having died in the interval, and the firm having been allowed to recover no portion of the advances which it had made for the working of the estate after his decease, it could not be required to pay again for the improvement in value of the estate which had resulted from its own advances.

Garth, C.J.—THIS appeal comes before us in a suit for administering the estate of the late Thomas Emerson Carter, deceased.

The appellants are the Bank of Hindoostan, China, and Japan, who contend that Mr. Justice Macpherson has, in his decree in the Court below, erroneously decided certain questions arising in the suit as between them and Messrs. Thacker, Spink, & Co., the defendants.

The facts are these:—

Mr. Carter, the deceased, being possessed of a large tea plantation in Assam, which he had no means to cultivate effectively, on the 22nd of July 1862, entered into an agreement with Messrs. Thacker and Spink (and also a Mr. Parbury, who is since dead) of Calcutta, by which he agreed to sell, and they agreed to purchase, a moiety of the said tea plantations and estates then belonging to Mr. Carter, at a price, which was to be ascertained, of one-half of the entire sum which had been expended on the property by Mr. Carter.

The 3rd clause of the agreement provides that the price of the moiety, when paid by Messrs. Thacker and Spink, should stand in the books and accounts of the estate as a charge thereon, bearing interest at 5 per cent. per annum, and should be paid to the firm of Thacker, Spink, & Co. out of the produce of the said estate, before any division of the profits or gains thereof.

Then the 4th clause, which is the material one, states that Messrs. Thacker and Spink should provide all funds necessary for cultivating, clearing, and carrying on the said lands and plantations, which shall bear the like interest, and *be repayable in like manner as is stipulated in respect to the moneys mentioned in the 3rd clause.*

It is then provided that Mr. Carter shall manage the cultivation of the estate subject to the approval of Messrs. Thacker Spink, and that, subject to the pay referred to in clauses 3 and 4, the net of the estates should be paid, one- Mr. Carter and the other half to Thacker and Spink; and there is further clause to the effect that Carter should, when called upon to convey Messrs. Thacker and Spink's as they should require.

In accordance with this last stipul Messrs. Thacker and Spink's moiety conveyed to them by a deed dated the October 1865; and on the following the 31st October 1865, Mr. Carter gaged the moiety of the property remained vested in himself to the Ban Hindoostan, China, and Japan, to secure tain sums advanced and to be advance him by the Bank; but it was expre stipulated in the mortgage-deed that Bank's interest was to be subject to agreement of the 22nd July 1862.

Mr. Carter died on the 2nd day of J 1872; and that it appears that, between 22nd July 1862 (the date of the agreem and Mr. Carter's death, Messrs. Thacker Spink had expended very large sums money in the cultivation and maintenance the plantations, which sums, after taki into account the value of the produce, le balance in Messrs. Thacker and Spink's fa of Rs. 3,67,367-7-3.

Subsequently to Mr. Carter's de Messrs. Thacker and Spink continued possession of the plantations and expend upon them further sums which, after ded ing the value of the produce, left a bala due to them of Rs. 3,43,620-0-5.

Under these circumstances the lear Judge in the Court below decided that, un the agreement of the 22nd July 18 Messrs. Thacker and Spink had a cha upon Mr. Carter's moiety of the plantati in priority to the Bank's mortgage, for balance claimed by them up to Mr. Carte death, but not for the sums subsequen expended; and further that the proper mo of adjusting the question between the parti was that Messrs. Thacker and Spink shou take over the plantations at the price Rs. 2,25,000, which was the sum at whic they were valued by the Bank's surveyo for their own purposes at the time of Carter's death.

Against this decree the Bank have now appealed, and it has been contended that they have a prior claim upon the estates for

r mortgage debt, upon the ground that the terms of the 3rd clause of the agree- t, the advances made by Messrs. Thacker Spink were to be charged, not upon the l itself, but only upon the produce of the l; whereas the Bank under the mortgage- had a charge on the land itself.

here was also this second point raised upon eal that the learned Judge was wrong in wing Messrs. Thacker and Spink to take r the assets of the partnership at so low aluation as Rs. 2,25,000, and that the just proper course would be that, if they e allowed to take over the property at they should do so at whatever might be nd to be its present value.

We are of opinion, however, that the ision of the learned Judge was perfectly ot upon both points. By the 2nd ase of the agreement the price of Messrs. acker and Spink's moiety was to be a arge upon the property itself, as well as on its produce, and Messrs. Thacker and ink were entitled to look to both these urces for the repayment of the purchase- oney; and then by the 4th clause, under ich Messrs. Thacker and Spink agreed make the requisite advances for carrying the cultivation, &c., it is stipulated that e advances were to be *repayable in the me way as the price of the moiety*, that out of the produce of the plantations, that sufficed; and, if not, then by a harge upon the land itself.

As regards the second point, it must be orne in mind that Messrs. Thacker and pink were only allowed the balance of their dvances up to the date of Mr Carter's eath; and, therefore, in adjusting their ghts, as against Mr. Carter's estate, it is lear that they should be allowed to take ver the estate at what it was worth at that me. And we think that the Court below was justified in taking the valuation of the Bank's surveyor as the index of what the state was really worth.

If taken at its present value, Messrs Thacker and Spink, who have been allowed no portion of the advances which they have made since Mr. Carter's death, would have to pay for the land the enhanced price, which it would now command by reason of those advances having been expended upon it.

The result is, therefore, that we quite agree with the decision of the Court below, and dismiss the appeal with costs on scale No. 2.

The 20th April 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Rent-free Claim—Consideration—Water-supply—Temples.

Case No. 1633 of 1874.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 4th May 1874, affirming a decision of the Moonsiff of Raneegunge, dated the 31st December 1873.

The Bengal Coal Company, Limited (Plaintiffs), *Appellants,*

versus

Hur Dyal Marwaree (Defendant), *Respondent.*

Mr. Atkinson for Appellants.

Baboo Chunder Madhub Ghose for Respondent.

Where the manager of a Coal Company had allowed persons to settle on the lands of the Company, on conditions about which a dispute arose, and the Company sought to assess the land to rent, and the tenants claimed to hold it rent-free, HELD by the High Court that, in the case of one plot on which the tenant had agreed to dig wells and had done so, the water which the villagers on the Company's estate drew from the said wells, was in the nature of a fair consideration for the land; and that, though the land was assessable to rent, the Company could not assess it so long as the villagers were supplied with water. In regard to another plot, however, in which some temples had been erected, HELD that the temples did not, in any way, further the objects of the Company, and could not be treated as fair consideration, and that the Company could assess the plot.

Glover, J.—THE Judge has now returned his finding on the issue sent down. He holds that the grant was in furtherance of the operations of the Company, and, therefore, within the scope of the general manager's authority, and that the land having been given for what was substantially a fair consideration, the grant was not a rent-free one at all.

On the first point I am of opinion that no general manager or even managing director of a Company has power permanently to alienate as rent-free the property of the shareholders without their consent first asked and obtained, and in this case, although it might have been convenient for the Company to keep the villagers in good humour and to make certain concessions to grantees for carrying out that purpose, the

digging of the well and the building of the temples can hardly be said to have furthered the Coal Company's operations.

But, with regard to the second point, which refers more particularly to the well dug in plot No. 1 (the western plot), I am inclined to think that the grant was not really a rent-free one. The object in giving the land was that the defendant should dig a well thereon and supply water to the villagers, and it is nowhere asserted that the defendants have not done this. The water thus supplied would form a consideration to the plaintiffs for the use and occupation of their land, and such a grant would, I apprehend, be within the power of a general manager to make. In the Full Bench case of Puzeerooddeen *vs.* Modhoo Soodun Pal, 2 Weekly Reporter 15, it was held that land given for the purpose of digging a tank, which was to supply the neighbourhood with water, although not charged with rent, was not a lakhiraj grant, because the water thus given for the general benefit was in the nature of a rent reserved, and that a zemindar had the power to make such a grant.

I see little difference between the principle of that case and the present, and am inclined to say that, so far as the western plot is concerned, the Company has no right to assess or demand a money-rent so long as the defendants keep up and distribute to all comers the usual supply of water.

With regard to the eastern plot, the case is, I think, different. Temples to some one or other of the numerous Hindoo gods can hardly be said to be necessary to, or in furtherance of, the Coal Company's operations, and moreover for this plot the defendants themselves were, from the first, willing to pay rent. No doubt the Company's manager declined to take it; but, unless he was empowered to grant rent-free tenures, that would not bind his employers, the Company.

I think that, as regards this plot, the plaintiffs have the right to assess and collect rent. We were given to understand at the hearing that the Company would be content with a nominal sum, and, if this be so, the parties can probably come to an understanding without any necessity for further proceedings.

But I would limit our decree strictly to declaring the Company's authority as maliks to demand rent from the defendants in respect of the eastern plot. I would not allow any mesne-profits and costs, for there can be no doubt that the defendants have acted throughout with perfect good faith trusting to the assurances given them by general manager, and that they have expended considerable sums in building the temples in question.

To this extent I would vary the judgment decree, and make each party pay their own costs.

Mitter, J.—I concur.

The 20th April 1876.

Present :

The Hon'ble F. A. Glover, *Judge.*

Further Evidence—Damages.

Case No. 1312 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of Shahye, dated the 5th April 1875, reversing a decision of the Moonsiff of Shahazadpore, dated the 11th June 1875.

Shookrah Shaikh (Defendant), *Appellant.*

versus

Nund Coomur Banerjee and another (Plaintiffs), *Respondents.*

Baboo Anund Gopal Paleet for Appellant.

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Respondents.

Where in a suit for arrears of rent, tenancy was acknowledged, but the rate of rent questioned by tenant and the Subordinate Judge, not feeling satisfied with documents purporting to show the rents during three years, called for the documents relating to payment of rent during three earlier years, HELD that the Subordinate Judge was justified in requiring this further evidence, because, though such evidence should rarely be called, it was within the discretion of an Appellate Court to do so, giving its reasons for the course which it pursued. Where the papers of earlier years showed that plaintiff had claimed too much, having increased in the claim for rent, HELD also that damages should not have been awarded.

THIS was a suit for rent. The defendant admitted the tenancy, but demurred to the amount of rent claimed by the landlord, and under section 46, Act VIII. (B. C.) of 1869 deposited in the Collectorate what he asserted was the proper rent.

The rent claimed was for the year 1282 B.S.

The landlord filed with his plaint jummawasil-bakee for the three preceding years, *viz.*, 1277-1278-1279 B. S., and the tenant on his part put in rent-receipts for those years.

The Subordinate Judge, for reasons given in his decision, disbelieved both jummawasil-bakee papers and receipts, and called

e parties (purposely giving them no ne than was necessary for the pro- of the documents) to file papers and for the three years preceding, *viz.*, 75-76-77. The plaintiff duly filed papers, the defendant did not. The dinate Judge then took up the case and gave the plaintiff a decree for mount of rent entered in the jumma- bakee papers of 1275-77 (which was erably less than the amount claimed suit), together with 25 per cent. es.

e objection taken in special appeal is e Subordinate Judge was not justified ding for the further evidence.

ion 355 of the Code of Civil dure gives an Appellate Court power to e further evidence, and the Judicial ittee of the Privy Council have not den the practice, as has been suggested e special appellant's pleader; all that Lordships have done is to lay it down ch additional evidence should be called rely and with caution, and that suffi- reason for the departure from ordinary should be recorded in the Appellate t's judgment.

this case, it appears to me that the rdinate Judge was, under the circum- ces, quite justified in calling for the papers receipts for 1275-77, and his reasons for so are to my mind perfectly satis- y.

this further evidence he came to a g as to what the proper rent due to aintiff was—it was less than that shown papers of 1277-79, probably because tter papers contained the sums collect- rent and as cesses (abwab) jointly.

e evidence being, I consider, properly tted, the finding as to the rate of rent e of fact on evidence with which this t cannot interfere.

t this was certainly not a case in which ges should have been given to the tiff, and after the opinion expressed by Subordinate Judge as to the plaintiff's duct, I cannot understand how he award- them. As, however, the pleader for the indar (special respondent), Baboo Chun- Madhub Ghose, is willing, on the part of client, that this part of the Subordinate ge's decree should be amended, I take opportunity of amending it accordingly. all other respects it is confirmed, and the cial appeal dismissed, each party paying own costs.

The 21st April 1876.

Present:

The Hon'ble F. A. Glover and E. G. Birch, *Judges.*

Special Appeal—Right determined by Decision.

Cases Nos. 3172 to 3177 of 1874.

Special Appeal from a decision passed by the Judge of Sarun, dated the 8th September 1874, reversing a decision of the Moonsiff of Pursah, dated the 31st January 1874.

Roy Jung Bahadoor and others (Plaintiffs), *Appellants,*

versus

Jugdeo Roy and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellants.

Baboo Nil Madhub Bose for Respondents.

In five suits for arrears of rent for sums under Rs. 100, in which no question of the right to raise the rent had been determined by the decision of the lower Court which dismissed the suit, no special appeal lay to the High Court.

Glover, J.—These were suits for rents based on a jummabundee signed by the zemindar's patwaree, and the Judge tried all the appeals together, making one judgment serve for all.

The tenants admitted the plaintiff's right to rent, the question between them was the amount. The defendants denied the claim of the landlord, but professed themselves ready to pay the amount they alleged themselves to have paid all along in previous

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years, and beyond which they refused to go.

The Moonsiff found for the plaintiff, but the Judge held that he had not proved the alleged increase of rents in 1267, before which date rent was admittedly paid at the rates now admitted by the ryots, and, therefore, dismissed his suits.

Five of these special appeals were for sums under Rs. 100, and regarding them a preliminary objection is raised by the special respondent that, under section 102 of the rent-law, no special appeal lies to this Court.

And this objection must, I think, prevail. The Judge, no doubt, says that the real point in contest was whether the defendant's rent was raised in 1267, and this would have, of course, involved the question of the landlord's right to raise it had it been found that the rent actually was raised in that year. But the Judge has found on the evidence that there was no alteration of the rent in 1267, and no question as to the right to raise it was, therefore, decided, or, as the section has it, was determined by the judgment.

In these five cases, therefore, no special appeal lies, and they must consequently be dismissed. The case from the 19 Weekly Reporter is not in point, because there the right to vary the rent was one of the questions decided by the judgment.

In the sixth case, No. 3174, the claim was over Rs. 100.

In this case, the Judge disbelieves the oral evidence, because it is that of servants and dependants of the zemindar, and is unsupported by the zemindaree papers, the appearance of which the Judge thinks suspicious: they are, says the Judge, "undoubtedly from their appearance alone, forgeries made for the purpose of this suit."

He goes on to say that their falsity is proved beyond doubt by the defendant's documents.

These are a copy of a report of the Collector's record-keeper, dated January 1874 (1267), in which the income-tax assessment papers filed by the plaintiff showed the defendant's tenure to be rated as alleged by him, and certain receipts for rent paid since 1267 which show the same rate.

Regarding these documents, it is sufficient to remark that the income-tax assessment refers to a time previous to the alleged change in the defendant's rent, and could, therefore, be no evidence that that rent was not raised in 1267, while the receipts not been proved. The Judge says they been "proved sufficiently," but I can proof at all of these documents. have not been attested, the grantor been examined, nor have the defen themselves come forward to swear to The Judge says that the fact of their bei defendant's possession, together with the pearance and contents, made him accept as genuine. It is hardly necessary to out that none of these things can prove their genuineness, and the Mo considered them not genuine. It has urged before us, and there is no doubt force in the contention, that the Judge decided against the plaintiff, not only the ground that his evidence is unsatisfac but the defendant's evidence is co sive. Had I been quite clear as to I should have held that, as defend evidence on which the Judge lay so stress was inadmissible, one portion being irrelevant, and the other altog unproved, an error of law involving an in the decision on the merits had been out which would justify this Court's inte ence in special appeal; but, after givin due weight to the fact that the Judge believed the defendant's evidence, we still met by the very divided and more once repeated expression of the Ju opinion that the oral evidence adduced the plaintiff is unreliable, and that his d ments are forgeries, and however uns factory we may think the judgment on whole to be, I do not see how it is pos to say that the Judge would have cert come to some other conclusion regar the plaintiff's evidence, if he had put of consideration the receipts filed by defendant. This is one of those cases illustrate the unsatisfactory nature of law of special appeals. We cannot rem the case to the Judge to pass a fresh deci leaving out of consideration the defenda documentary evidence, for there is nothing the remand sections of the Code that wo allow of such a course, and we cannot po tively say that in this way of deciding appeal the Judge has committed an error law which would justify me in reversing judgment, and in restoring that of Moonsiff.

I think, therefore, although I do so with some unwillingness, that this special appeal must be dismissed, but, under the circumstances, without costs.

Birch, J.—I concur.

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The 25th April 1876.

Present:

n'ble F. B. Kemp and E. G. Birch, *Judges.*

xecution of Decree—Limitation.

Case No. 218 of 1875.

neous Appeal from an order passed e Officiating Judge of Shahabad, the 17th April 1875, affirming an of the Subordinate Judge of that ict, dated the 19th February 1875.

l Doss (Decree-holder), *Appellant,*

versus

arain (Judgment-debtor), *Respondent.*

Mohesh Chunder Chowdhry and *hee Mahomed Yusuf* for Appellant.

o Amarendro Nath Chatterjee for Respondent.

xecution-case, in which the notice was served t the application for execution was made after ng of the present law of limitation, HELD that d within which proceedings should be taken eckoned from the date of the notice, and not date of application.

, *J.*—THE decree-holder is the ap- in this case.

decree dates so far back as July 1863; appellant before us appears to be the er of the decree which he now seeks to . The last application, and there en no less than seven applications, to the decree was in August 1874. judgment-debtor pleaded that the tion was barred, and he further stated the 5th of September 1872, which e date of the last application made the application in August 1874, the tion was barred, and, therefore, being on the 5th of September 1872, it o barred when the present application de in August 1874.

the lower Courts have held that the law of limitation applies to this case; cordingly, that, at the time the applica- s made on the 5th of September 1872, barred, inasmuch as more than three ad elapsed from the date of service of which was the 3rd of August 1869.

pecial appeal it is urged in the first hat the old law applies; and, secondly, e application of the 5th of September as not barred, inasmuch as, *firstly,* e runs, not from the date of service of notice, but from the date on which the application for execution was struck off, namely, the 15th of September 1869; and failing that, they contended that proceedings were taken to keep the decree alive, a warrant for the arrest of the judgment-debtor having been issued on the 2nd of September 1869, returnable on the 5th of September 1869, which would save the application of the 5th of September 1872 from being barred by the Statute of Limitation.

On the other hand, the pleader for the respondent has called our attention to a case in Volume XXIV. of the Weekly Reporter, page 20. That case precisely fits the facts of the present case. The notice in this case was served before, but the application was made after, the new law of limitation came into operation. And therefore the three years must be calculated from the date on which the notice was served.

Acting on that principle, the application of the 5th of September 1872 was beyond time; and that being the case, the application being once barred is always barred; and the subsequent application in 1874 does not take the case out of the Statute of Limitation.

The appeal must, therefore, be dismissed with costs.

The 26th April 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt., Chief Justice,* and the Hon'ble E. G. Birch, *Judge.*

Dispossession—Force of Decree.

Case No. 153 of 1875.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 1st October 1874, reversing a decision of the Additional Moonsiff of Durbhangah, dated the 31st July 1873.

Shaikh Mukbool Ali (one of the Defendants), *Appellant,*

versus

Shaikh Wajed Hossein and another (Plaintiffs), *Respondents.*

Mr. M. L. Sandel for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

Where a person was in actual possession of property from the time when a deed conveyed it to him, a deci-

sion which declared that deed to be fraudulent did not have the effect of putting another claimant in possession; nor could possession be considered as having ceased in consequence of the decree, unless the holder were actually dispossessed under it; for the fact of the decree did not prevent the Statute of Limitation from running, and, in the particular case under consideration, the decree in question was still under appeal.

Garth, C.J.—In this case I have yielded to the lenient view which is taken by my learned colleague. I should have been disposed myself to decide that the Judge was wrong, and that the Moonsiff's decision should stand; because I rather think we ought to presume that the Judge, when he professed to decide the issue, went into the whole evidence for that purpose. But Mr. Justice Birch appears to think that, in consequence of the wrong view taken by the Judge as to the effect of the deed, he may not have properly or at all considered the other evidence, and that in that view the case ought to go back for re-trial.

The Judge appears to have considered that, although the defendant may have been in actual possession from the time when this deed conveyed the property to him by way of endowment, still, as there was a decision on the 13th of June 1874, by which the defendant's deed (the deed under which he claimed) was held to be fraudulent, that decision in itself must necessarily have had the effect of putting the plaintiff in possession. We consider that this view was manifestly erroneous.

Whatever the decree might have been, the defendant's possession could not be considered as having ceased in consequence of that decree, unless he were actually dispossessed. The fact that there is a decree against him does not prevent the Statute of Limitation from running; and from what has been mentioned in Court just now, it is clear that possession has not yet been actually taken under the decree, inasmuch as it is still under appeal. That being so, we think that the judgment of the Lower Appellate Court should be set aside, and that the case should be remanded with directions to the District Judge to place the case on his file and try this issue himself. As the appellant has virtually succeeded in this appeal, we think that he should have his costs in this Court and in the Lower Appellate Court.

The 26th April 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Justice*, and the Hon'ble E. G. *Judge.*

Suretyship—Duration of Suretyship.

Case No. 2801 of 1874.

Special Appeal from a decision pass the Judge of Sarun, dated the August 1874, reversing a decision Moonsiff of Champarun, dated the January 1874.

Mohip Narain (one of the Defendan *Appellant,*

versus

Mr. F. A. Shaw (Plaintiff), *Respondent*

Baboo Abinash Chunder Banerjee fo Appellant.

Mr. C. Gregory for Respondent.

A surety must be taken to have entered into his tract only for the time during which the relation cre by the instrument of suretyship exists, and with ence only to the person to whom he made hi responsible.

Garth, C.J.—We think that the J has made a mistake here; and that the ju ment of the Moonsiff was correct. T point entirely depends upon what is proper construction of the instrument suretyship, and it is our duty to pu reasonable construction upon it, with re ence to the state of circumstances existin the time it was made. Now the facts w these: A new lease was taken by Mr. Ca bell as manager of this Indigo Company six years. The putwari was re-engaged Mr. Campbell at that time, and a surety required. The surety, naturally, when became responsible for the putwari's defal tions, did so with reference to what he kn at that time to be the existing state things. He knew that a lease of the fact was taken by Mr. Campbell for six yea The putwari was engaged to act for Campbell during that time. At the expi tion of that lease, it might very possibly be renewed. Mr. Campbell was not bou to renew it, nor was the putwari bound continue in Mr. Campbell's service. Th surety, therefore, must be taken to hav entered into the contract for the time during which the relation between Campbell and the putwari was then to continue, and not only with reference to the *time*, but also with reference to the *person* to whom he was

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making himself responsible. It was never intended that the contract of suretyship should render him liable for life, nor to any person who might happen to take the factory after Campbell's lease expired; and as a matter of fact, at the expiration of that lease, a new lease was taken, and by an entirely different person, Mr. Shaw, who, it seems, arranged to continue the putwari's services. No communication, however, was held with the surety with reference to this fresh arrangement; and the defalcations for which it is said the defendant is responsible took place after the new lease was executed Under these circumstances we think that the defendant is not responsible. The appeal will, therefore, be allowed, the judgment of the Lower Appellate Court will be reversed, and the decision of the Moonsiff restored with costs in this Court and in the Lower Appellate Court.

The 26th April 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mortgage-sale—Prior Lien—Release from Lien.

Case No. 1049 of 1875.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 10th March 1875, reversing a decision of the Sudder Moonsiff of that District, dated the 20th February 1874.

Jankee Pershad (one of the Defendants), *Appellant,*

versus

Baboo Ajoodhya Doss (Plaintiff), *Respondent.*

Mr. M. L. Sandel and *Baboo Chunder Madhub Ghose* for Appellant.

Baboo Taruck Nath Paleet for Respondent.

Where the former of two mortgagees, to whom a certain person hypothecates his estates, accepts from the auction-purchaser, who buys a portion of the estates when they are sold on foreclosure of the second mortgage, a sum of money assessed by a Civil Court as the equivalent of the former mortgagee's prior charge on the estates, no successor of the former mortgagee can again proceed to sell up the estates, even though the Court which assessed the money-value of the charge on the estates may not have had the jurisdiction to do so; for, in accepting the money, the former mortgagee released the estate from all further liability under his bond.

Kemp, J.—One Punchun Sahee appears to have been involved. He executed two mortgage-bonds—the first mortgage in favour of Ram Dehal Singh, and the second in favour of Odhin Lall. The appellant before us, the defendant No. 1, claims through Ram Dehal. So far as the contention in this case is concerned, it will be necessary to mention only two of the properties mortgaged, Bhugwanpore Khocha and Chowmook. Other properties were also mortgaged. Odhin Lall, although his mortgage was subsequent to that of Ram Dehal, appears to have been more active in taking out execution than the prior mortgagee; for it was in execution of Odhin's decree that the first sale took place, when Lot No. 1, Bhugwanpore Khocha, was bought by Gopal Doss, the father of the present plaintiff, respondent, and Lot No. 2, Chowmook, by Mohun Sahee. That was in 1868. Subsequently Ram Dehal, the prior mortgagee, put his decree into execution, and attempted to sell both the mouzahs in satisfaction thereof. Gopal Doss, the father of the plaintiff, objected on the ground that he had already purchased the property No. 1. His objection was overruled for the reason that Ram Dehal's mortgage was prior to that of Odhin Lall through whom Gopal Doss claimed. Upon this, Gopal Doss appears to have moved the Court to sell the properties as they were marshalled in the mortgage-deed—Chowmook first, and then Bhugwanpore Khocha. To this arrangement the other purchaser Mohun Sahee objected, he having purchased Chowmook. He urged that the sale ought to be according to the precedence laid down in the sale-istahar. Then comes the order, an important order in the case. The Subordinate Judge, whether rightly or wrongly, on the 9th of September 1868, held that Gopal Doss and Mohun Sahee, the purchasers of Bhugwanpore Khocha No. 1, and Chowmook No. 2, were liable under the mortgage of Ram Dehal to satisfy his decree, and that it would be equitable that they should pay rateably according to the sums for which the properties Nos. 1 and 2 were sold, the auction-price being rateably 850 rupees for No. 1, and 3,000 rupees for No. 2. So that the amounts rateably assessed payable by the two purchasers were 590 rupees by Gopal Doss, and 2,160 rupees by the other purchaser, Mohun Sahee. Gopal Doss deposited 590 rupees in obedience to this order of the Court; and it is clear and admitted that Ram Dehal, the decree-holder, not only took the 590 rupees deposited by Gopal Doss, but also the sale-proceeds of the other mouzah, namely, Chowmook, which had been purchased by Mohun Sahee, amounting to

3,000 rupees. Subsequently, Chowmook was sold first, because Gopal Doss had complied with the order of the Court, and had deposited the 590 rupees assessed rateably on account of the property No. 1, Bhugwanpore Khocha. The sale of Chowmook did not satisfy Ram Dehal's decree, and he applied for the sale of Bhugwanpore Khocha. The Court did not allow this, but directed a third property, which was also hypothecated, to be sold. Eventually the property No. 1, Bhugwanpore Khocha, was sold on the 5th of August 1872, and bought by the special appellant before us.

The present suit is instituted to set aside the purchase by the defendant No. 1 of the property of Bhugwanpore Khocha, on the ground that it had already been purchased by Gopal Doss; and that Ram Dehal, the decree-holder, by taking the 590 rupees deposited by Gopal Doss and the sale-proceeds of the other mouzah, had released the property No. 1 from liability under the mortgage-lien, and also on the ground that the purchase by the defendant No. 1 was fraudulent.

The first Court held that the Subordinate Judge had no jurisdiction to pass the order of the 9th of September 1868; that that order was *ultra vires*, and that, therefore, the plaintiff's suit to set aside the sale and the purchase by the defendant No. 1 must be dismissed with costs.

The Judge on appeal has reversed that decision. He has held that, whether the order of the Subordinate Judge of the 9th of September 1868 was one passed with or without jurisdiction, it was not in the power of the original decree-holder, Ram Dehal, through whom the defendant No. 1 claims, to follow up the property in dispute in satisfaction of his decree, inasmuch as he had already, by his own act, released that property from all liability under his mortgage-lien; and that, therefore, that property could not be sold in execution of his decree. He further found that the second purchase by the defendant No. 1 was fraudulent and altogether null and void.

The argument in special appeal is that the Subordinate Judge had no jurisdiction to pass the order of the 9th of September 1868; that, as the mortgage of Ram Dehal was prior in date to that of Odhin Lall, the special appellant, who claims through Ram Dehal, was entitled to hold the property which he purchased at the sale of the 5th of August 1872; and that the decision of the Judge is wrong in law.

On the other hand, it is contended that this case does not involve the quest priority of mortgage; but that Ram D the decree-holder, through whom the s appellant claims, having taken the 590 r deposited under the orders of the C and having also taken out the sale-proc of the other mouzah, his lien on the pro No. 1 ceased; and that, therefore, the s which the defendant No. 1 purchased ca prevail against the purchase of Gopal D which is prior in date, although the m gage of Odhin Lall is subsequent in to that of Ram Dehal.

We think that the decision of the Ju is right. The decree-holder, Ram D clearly could not have followed the pro in satisfaction of his decree, inasmuch a had accepted the 590 rupees deposited Gopal Doss, and also the sale-proceeds of second property which was purchased Mohun Sahee; and subsequent to that, a having given up his lien on the property, sold his rights under his decree to defend No. 1, who purchased, in execution of decree, what the party from whom he chased had no right to sell.

Holding, therefore, that the Judge right in law, we dismiss this appeal w costs.

The 27th April 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, C *Justice*, and the Hon'ble E. G. Bi *Judge.*

Illegal Cess—Tullub-beshee—Cess incorpor with Rent.

Case No. 1007 of 1875.

Special Appeal from a decision pa by the Second Subordinate Judge Beauleah in Rajshahye, dated the 1 December 1874, modifying a decision the Moonsiff of Serajgunge, dated 13th April 1874.

Serajgunge Jute Company, Limited (Plaintiffs), *Appellants*,

versus

Torabdee Akoond and others (Defendants) *Respondents.*

Mr. Adkin for Appellants.

Baboo Grija Sunkur Mojoomdar for Respondents.

Where a ryot has, for many years, been paying a *tullub-beshee* of 2 annas in each rupee in addition to the

ma of his holding, and the two payments have porated in time, and have actually formed the f a single receipt, which the zemindar d the ryot to produce, but which the ryot produce, HELD that, if a ryot, for the purpose ting disputes with his landlord and for his own interest, agrees to make a definite to his landlord in addition to his rent, the l payment cannot be treated as an illegal cess, w favours such arrangements, and provides for g enforced.

ith, C.J.—BOTH the lower Courts aken the same view of the evidence case, but the Subordinate Judge that the plaintiff cannot recover the laimed, because a portion of it (two in the rupee) entered as tullub- is, in his opinion, an illegal cess. nding of the Moonsiff upon the evi- is, that for twenty years and upwards nants have paid rent at the rate claim- the plaintiff Company. The Subor- Judge says that, although he does not te the correctness of the Moonsiff's g in this respect, this payment does prove that the ryots had agreed that whole sum so paid by them was their jumma, and that, therefore, he must llow the amount entered in previous mabundees as tullub-beshee.

is found by both Courts that prior 77 the amount now claimed as jumma ntered under two headings in the jumma- dee, the first being called the "asal ma" and the second the "tullub- ee." In the jummabundee papers 1278, the item of "tullub-beshee" was olidated with the "asal jumma," and from time the total of the two columns entered in one sum in the same column r the name of jumma, receipts being to the tenants for that amount, which ipts, it is worthy of remark, the defend- have refused to file.

Upon disputes commencing between land- rds and tenants in the Pubna District, defendants deposited in the Collectorate sum formerly paid as the asal jumma. ey refused to pay the sum entered as jumma" in the jummabundee of 1278, hich included both the "asal jumma" and e "tullub-beshee."

The plaintiff avers that, if the defendants oduced their dakhilas, they would show t there has been an uniform payment of rent at the rate claimed in the present suit for very many (upwards of 20) years past.

The Moonsiff very properly remarks that the defendants could have shown by their dakhilas whether the sum claimed had been paid in former years or not; but the Subordinate Judge seems to be of opinion that the production of these receipts, for however long a time they might show the rent claimed to have been paid, would not help the plaintiff's case.

On special appeal it is contended by the appellants that the Subordinate Judge is wrong in law in treating this item of tullub-beshee as necessarily an illegal cess; because if it was the result of an agreement made by way of compromise or composition made between the zemindar and the ryots many years ago, and acted upon by both parties since that time, there is no illegality in it.

On the other hand, the respondents' pleader contends that being an additional rent imposed over and above the asal jumma, it must necessarily be an illegal cess; and he has referred us to two cases in this Court which, he contends, support the view taken by the Subordinate Judge.

The first of these is reported at page 258 of the 10th volume, Weekly Reporter.

The facts of the case are not given; but the judgment proceeded upon two grounds—*first*, that the Court had no jurisdiction to try a case brought for a cess over and above the actual rent; and, *secondly*, that the plaintiff could not recover from his ryot anything beyond that rent except upon *some express contract to pay it.*

The second case cited is a very peculiar one. It is reported in Volume XI., Weekly Reporter, page 395; 3 Bengal Law Reports, page 44. In that case the defendants had taken a village in ijara from the plaintiffs for ten years. The defendants then sub-let their interest, and, having done so, they wrote to the plaintiffs, the zemindars, to this effect:—

"We have been getting your parobi "(festival cess) paid from the village at "Rs. 175. The dur-ijaradar (to whom "the ijaradar had let his interest) has "nothing to do with the said parobi; we "shall pay you the same year by year."

It was found by both the lower Courts,

and not denied by the plaintiffs, that the "parobi" in question was an *arbitrary* and *indefinite* cess imposed by the ijaradar upon the ryots, which was clearly illegal under section 10 of Act X. of 1859.

The suit was brought to recover the Rs. 175 which the ijaradar had contracted to pay the plaintiffs in consideration of his being allowed to continue to exact this parobi from the ryots, and the Court very properly considered that the suit would not lie, inasmuch as the claim was founded upon a manifestly illegal consideration.

Both these cases are very clearly distinguishable from the present. Here both the Courts have found that the fixed demand of two annas in the rupee has been uniformly recognized and paid by the tenants and paid for upwards of twenty years; and we think that, from this long and continuous payment of a definite and fixed charge upon every rupee of asal jumma, we fairly presume an original specific agreement between landlord and tenant by way of composition, which was, at the time it was made, a beneficial arrangement to both parties. It is just one of those cases which were contemplated by the concluding words of section 3 of Regulation V. of 1812 by which the Courts were enjoined to enforce payments of sums so specifically agreed upon. The provision against arbitrary and indefinite cesses was made in favour of the ryot, but, if the ryot, for the purpose of preventing disputes with his landlord and for securing his own interests, thought fit to agree to make a definite payment to his landlord in addition to his asal jumma, the law rather favoured such arrangements, and specially provided for their being enforced.

In the case before us, no specific arrangement has been actually proved, but there has been an uniform payment of a certain sum as the consolidated rent of the tenure; and under such circumstances we think that the Moonsiff was quite right in presuming that an agreement for the additional rent must at some time have been entered into.

We therefore reverse the judgment of the Subordinate Judge, and restore that of the Moonsiff. The appeal is decreed with costs.

The 28th April 1876.

Present:

The Hon'ble F. B. Kemp, and F. A. G[illegible]
Judges.

Double Mortgage—Double Sale—Priori[illegible] Claim.

Case No. 1513 of 1874.

Special Appeal from a decision passe[illegible] the Officiating Judge of Gya, dated [illegible] 23rd April 1874, affirming a decisio[illegible] the Subordinate Judge of that Di[illegible] dated the 19th November 1873.

Ajoodhya Pershad (Plaintiff), *Appella[illegible]*

versus

Musst. Moracha Kooer and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Moonshee Maho[illegible] Yusuf* for Appellant.

Mr. M. L. Sandel for Respondents.

An estate having been sold by auction on two [illegible] sions in satisfaction of two distinct bonds, and [illegible] person who had proceeded on the later-dated of [illegible] two bonds, but who represented the earlier and [illegible] purchaser, having actually taken possession of [illegible] estate, HELD that though, in a properly brought [illegible] between the two parties to declare the property [illegible] for the amount of the first mortgage, the party [illegible] possession would have to pay to secure his possess[illegible] yet he could not be ousted by the opposite party.

Glover, J.—THE Judge has decided th[illegible] case in favour of the defendant, on the grou[illegible] of his representing an auction-purcha[illegible] prior in date to that put forward by th[illegible] plaintiff.

The claims of both parties are on bon[illegible] specially registered under sections 52-5[illegible] Act XX. of 1866, so that neither decr[illegible] could have legally imposed any lien on th[illegible] property.

The plaintiff's vendor's bond is dat[illegible] November 5th, 1867; his decree, 30th Ju[illegible] 1868. The defendant's vendor's bond is [illegible] the 27th March 1868, and his decree of th[illegible] 6th November of the same year;' but th[illegible] auction-sale at which the defendant's vendor [illegible] (he purchased under his own decree) bought [illegible] took place on the 25th January 1869, whilst [illegible] that at which the plaintiff's vendor (likewise [illegible] a decree-holder purchaser) bought was not [illegible] held till the 9th of March 1869. These dates [illegible] do not correspond with those in the Judge's decision, but they are the correct ones as shown by the record.

Mr. Allan, for the special appellant, contends that, inasmuch as his client's vendor's

nd decree were prior in date to those defendant's vendor, all that the latter t at the sale was the right to pay off t mortgagee and then to take posses- It is possible that, as, between the iff and defendant, there may be an of this description, and that in a suit rly brought to declare the property for the amount of the plaintiff's age, the defendant in possession would o pay in order to retain his purchase. his suit is brought to turn the defend- t of possession, on the ground that the iff's lien is the older one. But this t be. In the first place, there has been cision of a Court that the property is , the bond having been especially regis- ; and, secondly, the defendant, who t the right, title, and interest of the nent-debtor, and got possession of the in due course, cannot be ousted until it oved that the land is still liable for er debt, and then only if he neglects or es to pay off that debt and allows er sale to take place.

e defendant being the first purchaser n possession under his purchase, the was, we think, right in confirming the Court's decree, and in refusing to give ession to the plaintiff. The special al is dismissed with costs.

The 1st May 1876.

Present:

Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

ation—Right of Alienation—Self-acquired roperty—Adoption—Krittima Adoption.

Case No. 30 of 1875.

ular Appeal from a decision passed by Subordinate Judge of Gya, dated 8th October 1874.

oo Juswant Singh for self and as guard- n of Baboo Ram Sahoy, minor (Plaintiffs), *ppellants,*

versus

oolee Chund and others (Defendants), *Respondents.*

r. J. T. Woodroffe and *Moonshee Mahomed Yusuf* for Appellants.

Mr. C. Gregory for Respondents.

here the sons of a certain person, who had been ted as a *krittima* son, sought to set aside certain alienations of self-acquired property which the adoptive father had made, on the double ground that as grandsons they had an interest in that property, and that the alienations were for improper purposes, HELD that, as the alienations were proved to be for legitimate purposes, and the relations established by the *krittima* form of adoption were confined to the contracting parties, and did not extend beyond them on either side, the plaintiffs in this case had no right to set aside the alienations which the adoptive father of their father had made.

Kemp, J.—THE plaintiffs are the appellants in this case. Juswant Singh sues for self and as guardian of his minor brother. The defendants are, Baboo Doolee Chund, the purchaser, in person and as guardian of the minor son of the late Baboo Girdharee Lall, and Baboo Digpal Lall, and Baboo Nirban Singh, who is the father of the plaintiffs.

The object of the suit is to set aside certain alienations made by the father of the plaintiffs, and it was instituted on the 21st of April 1874, ten years and four months after the execution of the deeds by the father which this suit seeks to set aside. Nirban Singh, the defendant No. 3, the father of the plaintiffs, is still alive; and it is alleged on the part of the defendant, Doolee Chund, that this suit has been brought by the father in the name of the sons. Suffice it to say that Nirban Singh, the father, did not appear in this case, nor has he been examined by the plaintiffs. The defendant made some attempt, but unsuccessfully, to bring him into Court, and to have him examined.

The suit of the plaintiffs is that their father, the defendant No. 3, Nirban Singh, "during his minority, having been excluded from the family of his natural father, was taken in adoption by Baboo Tika Singh." Now this is rather a roundabout way of putting it. But what we are told this means is that the adoption was according to the *duttaka* and not the *krittima* form; and, therefore, the words used are "having been excluded from the family of his natural father," inasmuch as if the adoption was in the *krittima* form, he would not be excluded. Be that as it may, this is certainly a very obscure way of putting the case. The plaint then goes on to say that Nirban Singh, being divested of the inheritance of his natural father, became the son and heir of Tika Singh, and the plaintiffs also, being divested of the right of inheritance to the estate of their natural grandfather, became, according to the Shastras, the "*bond-fide* grandsons and heirs to Tika Singh," and all the rights, which under the Shastras a grandson has in the estate of a grandfather, the plaintiffs possess in the disputed property acquired (this is

important) and left behind by Tika Singh their veritable *Shasteri* grandfather. Then paragraph 2 says the aforesaid property (the property in dispute, the alienation of which the plaintiffs seek to set aside) was acquired by the grandfather of the plaintiffs, Tika Singh, who died leaving the whole property free from the encumbrances of any debt; that Nirban Singh, the father of the present plaintiffs, succeeded on the ground of life-interest to the aforesaid property, and that the plaintiffs from the date of their birth lived with their father Nirban Singh, the defendant No. 3, jointly; that these alienations in the absence of legal necessity are absolutely in contravention of law and Shastra; and that, therefore, the plaintiffs are competent to have these alienations set aside. The properties are then detailed at the foot of the plaint.

Baboo Doolee Chund and others defend the suit.

Certain preliminary objections were taken which have not been argued before us, and, therefore, we shall not refer to them. In paragraph 5 of their written statement Doolee Chund and the other defendants say, and we think rightly, that the plaintiffs have not clearly characterized the adoption of their father Nirban Singh; that the fact is that Nirban Singh was adopted as the *kurta puttur* by Tika Singh; that, therefore, the plaintiffs cannot, according to the Hindoo Law, be recognized as the grandsons of Tika Singh; and that the estate of Tika Singh was not ancestral property, but on the contrary it was his self-acquired property. Then in paragraph 6 they refer to a former suit brought by Tiluk Kowar, the widow of Tika Singh, against the father of the present plaintiffs, namely, Nirban Singh; and they state that in that suit Nirban Singh, in his written statement as also in his evidence, said that he was adopted under the *krittima* form; and that, under these circumstances, the present allegation of the plaintiffs that they and their father were debarred from the inheritance of their natural father and grandfather is false, fallacious, and contrary to law. In paragraph 7 they say that, as the plaintiff Juswant Singh was born previous to the adoption of Nirban Singh, he cannot in any way inherit the property of Tika Singh as his grandson. They then refer to a precedent to be found in 18 Weekly Reporter, page 477, the decision of the late Chief Justice Sir Richard Couch and Mr. Justice Ainslie. That decision treats of the control possessed by a son over his father's power of alienation, and decides that cannot control his father's right in of property, the succession to which is to obstruction, and that it is only in of property not liable to obstruction wealth of the father or grandfather be the property of his sons or grandsons virtue of birth. The defendants also that, when Nirban Singh was adopted Tika Singh, he was of the age of eig years, and that he was of that age is ad by Nirban Singh in his written state and evidence in the former suit brought Tiluk Kowar, the widow of the late Singh, against Nirban Singh. Then state that, if it is necessary to enter into question of legal necessity, the prop were alienated by Nirban Singh, the of the plaintiffs, to liquidate zur-i-pe and other debts recognized by the Hi Law; that, under pressure of these neces Nirban Singh alienated the properties defendants for adequate consideration; the defendants made the necessary inq before purchasing these properties; there was considerable litigation be Tiluk Kowar, the widow of Tika Singh, Nirban Singh, the father of the plai in which the adoption of Nirban Singh contested by the widow, who claimed entitled to the whole of the estate of husband in right of inheritance, and it to supply Nirban Singh with funds to on this litigation that the assistance of defendant Doolee Chund (who is a rich hajun) was invoked, and that he lent Ni Singh money for the purposes of this li tion, and also to pay zur-i-peshgee and debts.

The Subordinate Judge, Moulvie S Imdad Ali Khan Bahadoor, after la down a considerable number of issues, decided the case upon one point alone, out going into the question as to wh the purchases made by the defendant under legal necessity or not. But, as whole evidence is on the record, and as sides admit that this Court can, if neces come to a finding on the merits, nam whether these alienations were made un legal necessity or not, without necessita a remand, we have allowed the argument proceed both on the law point as well as the merits. The Subordinate Judge fi that the plaintiffs' claim on the ground inheritance to Tika Singh is not tena according to the Shastras. He refers to copy of the deed of adoption, which says has been verified on oath by Re

n old mookhtear of the plaintiffs and lfs' father; and also to the copy of ritten statement of Nirban Singh, the 14th June 1865, and upon these he hat the plaintiffs' father, Nirban Singh, dopted in the *krittima* and not in the a form. He then goes on to say: "Al- some of the witnesses depose to the a form of adoption, their statements t countervail the statement of Nirban and of the witnesses examined in the lit." Then he refers to Macnaghten's o Law, and says that it is not lawful e in adoption by the *duttaka* form a beyond five years of age, and when it ved from the deposition on oath given e plaintiffs' father that he was adopted ka Singh at the age of eighteen, he can- e assumed to be a *dutluck puttur* or Tika Singh adopted according to that of adoption. For these reasons, inas- as he finds that Nirban Singh was d to be the son of Tika Singh accord- o the *krittima* form of adoption, the iffs cannot be recognized as Tika Singh's and the property being the self-acquir- roperty of Tika Singh, Nirban Singh t liberty to transfer the same. With- oing into the other issues the Subordi- Judge dismissed the plaintiffs' suit with

e first question, therefore, which we to dispose of in this case is under what of adoption was Nirban Singh adopted Tika Singh. There was considerable ment on both sides as to what evidence admissible and what inadmissible in this The learned Counsel, Mr. Woodroffe, uously objected to the admission as nce by the Subordinate Judge of the of the written statement of Nirban h, the evidence of Nirban Singh, copy of the alleged deed of adop- and the evidence of the witnesses re- ed in the former suit. We must here rve that the whole record of the former had been sent for by the Subordinate ge, and it appears that he based his judg- t, not only upon the evidence recorded in present case, but on the evidence recorded he former suit. Mr. C. Gregory, who eared for the respondent, contended that, he lower Court had sent for the record in former suit under the provisions of sec- 138 of the Civil Procedure Code, we ght to send for that record before coming a decision. We think that we ought to fine our decision to such evidence as was ore the Subordinate Judge and which was used by him in this case without objection on the other side. Now it is very clear that among the documents used by the Subordinate Judge without any objection on the other side is to be found the copy of the written statement of Nirban Singh. That statement is also to be found in the proceedings in appeal to this Court, which have been printed with the record of the Privy Council Appeal No. 7 of 1867, which is on the records of this Court, and which, under the provisions of section 138 of the Code of Civil Procedure, we are entitled to send for, the inspection of such record being, in our opinion, likely to elucidate the facts of the suit before us. We sent for the record, and we find at page 4 of the record of the appeal to the Privy Council No. 7 of 1867 the written statement of Nirban Singh filed on the 15th of June 1865, nearly ten years prior to the institution of the present suit. In that written statement of the 15th of June 1865, Nirban Singh says that he was educated by Tika Singh from his infancy; that Tika Singh performed all such religious ceremonies under the Hindoo Law as tonsure and junnaoo (investiture with sacred thread), marriage and the like at his own expense; and that at last, when the said Tika Singh despaired of having any issue, he adopted him (Nirban Singh) under the Hindoo Law as his *kurta puttur* on Monday the 20th of Magh 1263, and, by executing and delivering a registered deed of *kurta puttur* on Monday, the 20th of Magh 1263, he declared him, Nirban Singh, to be the malik and heir of all his moveable and immoveable properties. Now this written statement is very important. The former suit was brought by Tiluk Kower, the widow of Tika Singh, who, in the present suit, was alleged to have adopted Nirban Singh not in the *krittima* but in the *duttaka* form. Tiluk Kower, the widow, broadly stated that Nirban was never adopted at all by Tika Singh, and that, under the Hindoo Law, as the widow of Tika Singh, she was entitled to succeed to his property. In the decision of the first Court in that case to be found at page 271 of the Privy Council paper-book, we find that the issue of fact was this: "Whether the plaintiff's late hus- "band left her, that is, his widow, as his "only heir, and she succeeded to the pro- "perty left by him and maintained uninter- "rupted possession of the same till she was "forcibly dispossessed by the defendant "Nirban Singh; or that the said Tika Singh "adopted the defendant Nirban Singh as "his *kurta puttur* on the 20th of Magh

"1263, and executed a deed of adoption in "his favour, and on his death Nirban Singh "succeeded him as his heir and entered upon "possession of the properties left by him." On that issue the Subordinate Judge found that the adoption was not proved, and the plaintiff, the widow, obtained a decree. On this there was an appeal to the High Court by Nirban Singh. The third ground of the appeal of Nirban Singh says that "the Prin-"cipal Sudder Ameen is wholly wrong in "rejecting the claim of the defendant on the "ground of the deed not having been pro-"duced when its absence has been satisfac-"torily accounted for," the deed being, according to Nirban Singh's own allegation in his written statement, a deed adopting him in the *krittima* form. The learned Judges who decided the appeal, Mr. Justice Loch and Mr. Justice Louis Jackson, observed that, "looking "at the whole evidence before us, we think that "the evidence in support of the adoption is "more worthy of regard than that adduced "by the plaintiff, and under this view we "reverse the decree of the lower Court, and "dismiss the plaintiff's suit with costs." So that the result of the litigation between Tika Singh's widow, Tiluk Kower, on the one hand as plaintiff, and Nirban Singh on the other hand as defendant, was that the adoption of Nirban Singh was considered by this Court to be established in the *krittima* form as alleged by him; and the claim of the widow, which was based on the allegation that no adoption of any kind had taken place, was rejected, and her suit dismissed.

We may observe that, although there was an appeal to the Privy Council, the appeal came to nothing, as it was not prosecuted. We therefore think, looking to the written statement of Nirban Singh in the former suit and to the character of the adoption raised in that suit, as well as to the *factum* of the adoption decided by the High Court against the widow on the written statement and allegation of Nirban Singh and the evidence adduced in that case, that the Subordinate Judge was right in his finding that the adoption of Nirban Singh was in the *krittima* and not in the *duttaka* form. Considerable stress is laid by the appellant on the fact that some of the witnesses examined in this case by the plaintiffs state that certain ceremonies, such as tonsure and investiture of the sacred thread, were performed by Tika Singh when Nirban lived with him as his adopted son. Now, if it were not for the written statement of Nirban Singh himself, there might be some force in this argument, but, when we turn to that written statement, the fact, that those ceremonies were performed and that Nirban was married by Tika Singh and at his expense, becomes of minor importance, because Nirban admits that he was from his infancy brought up by Tika Singh, though he was not adopted by him until Tika Singh had despaired of having any issue of his own. Therefore we entirely concur with the Subordinate Judge in his finding that the adoption of Nirban was in the *krittima* form.

Then comes the question whether, admitting it to be so, the plaintiffs are precluded under the Hindoo Law from disputing the alienations made by Nirban Singh in favour of the defendant Dooli Chund, supposing that these alienations were not made for purposes sanctioned by Hindoo Law, that is to say, that they were made for immoral purposes as alleged by the plaintiffs. In the former case it was admitted by both parties, namely, by the widow of Tika Singh and by Nirban Singh, who was defending the suit, in which the point at issue was whether the widow was to succeed to the estate of Tika Singh or Nirban Singh as his adopted son, that the property in dispute was the self-acquired property of Tika Singh. In this case, also, the plaintiffs say that the property was the self acquired property of Tika Singh. Under the Hindoo Law as laid down in Macnaghten, Volume I., page 76, and also in a decision of this Court in Volume VIII. of the Weekly Reporter, the relation of *krittima* son extends to the contracting parties only, and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father. It is also clear under the Hindoo Law that the *krittima* son does not inherit collaterally. Now, as we have found in concurrence with the Subordinate Judge that Nirban Singh is the *krittima* son of Tika Singh, and as the property in dispute is admittedly the self-acquired property of Tika Singh, the plaintiffs, who are the sons of Nirban Singh, who was the son of Tika Singh according to the *krittima* form of adoption, can, under the Hindoo Law as already stated, be no heirs of Tika Singh. It is, therefore, perhaps unnecessary for us to enter into the merits of the case; but, as the whole case has been argued, both on the law point as well as on the merits, we may mention here that there is no satisfactory evidence that these alienations were made by Nirban Singh for any immoral purposes.

One or two of the witnesses say that he was in the habit of attending *nautches*, but we do not see that there is anything immoral in his so doing, otherwise the alienations of every native gentleman in this country would be liable to be questioned. The evidence shews, particularly the evidence of the mookhtear, that there was considerable litigation between the widow of Tika Singh and Nirban Singh, and that, but for the assistance of Dooli Chund Mohajun, Nirban Singh would not have been able to have contested that suit up to the High Court and Privy Council, although it fell through in the latter Court for want of prosecution on the part of the appellant. There is also evidence that there were zur-i-peshgee and other debts which were paid off out of the money borrowed from Dooli Chund.

Therefore, without going more minutely into the evidence of the case on the merits, we find that the plaintiffs are not in a position to question the alienations of Nirban Singh, and we confirm the decision of the Subordinate Judge, and dismiss the appeal with costs payable by the appellants.

The 1st May 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Mortgage—Wassilat—Deposit.

Case No. 60 of 1875.

Regular Appeals from a decision passed by the Second Subordinate Judge of Patna, dated the 17th December 1874.

Baboo Gobind Pershad and another (Plaintiffs), *Appellants*,

versus

Dwarka Nath, manager of the estate of Dabi Pershad, lunatic, and others (Plaintiffs), *Respondents*.

Mr. C. Gregory and *Baboo Chunder Madhub Ghose* for Appellants.

Baboo Unnoda Pershad Banerjee for Respondents.

Case No. 61 of 1875.

Dabi Dutt Singh and others (some of the Defendants), *Appellants*,

versus

Baboo Gobind Pershad and another (Plaintiffs), *Respondents*.

Moonshee Abdool Baree for Appellants.

Baboo Unnoda Pershad Banerjee for Respondents.

Where a mortgagor deposits the amount of the mortgage for the express purpose of preventing a foreclosure, he is entitled to wassilat, of which the mere fact of his having put in a petition, which refers to some other suit between him and mortgagee, but does not prevent the latter from taking out the deposit, cannot deprive him. Where a mortgagor is liable for only a portion of the mortgaged property, but pays in the whole amount to secure himself against his co-sharers, he is entitled to wassilat for the whole.

Garth, C.J.—THERE has been only one substantial point argued in this case, *viz.*, whether the petition under which the mortgagor deposited the mortgage-money was in such a form as to prevent the mortgagee from taking the money out, and to deprive the mortgagor of the right to the wassilat from the time when the deposit was made.

It is admitted that, if the petition had been in the ordinary form, so that the mortgagee could clearly have taken out the money at once, the mortgagor would have been entitled to the wassilat which has been awarded him by the Court below; but the petition, it appears, stated that there was another suit pending at the time of the deposit in which the mortgagor, alleging that the mortgagee had realized a sufficient sum from the proceeds of the sale to pay off both the principal and interest of the mortgage-debt, claimed to be entitled to recover the property from the mortgagee, without making him any further payment, and the Government pleader argues on behalf of the mortgagee that this statement in the petition imposed such a condition on the deposit itself as that it prevented him, the mortgagee, from taking out the money.

We cannot consider that this is the true view of the case. There was no condition annexed by the terms of the petition to the deposit of the mortgage-money. The deposit was made in the name of the mortgagee; and there was no reason whatever why he should not have taken out the money so deposited. If he had taken it out, he would undoubtedly have been bound to give up possession of the mortgaged property, or to account to the mortgagor for the wassilat; and the fact of his not having taken out the money, when he might have done so, ought not to place the mortgagor in any worse position.

There are two cases which were referred to in the course of the argument which we think it right to notice. One (Pran Nath

"1263, and executed a deed of adoption in "his favour, and on his death Nirban Singh "succeeded him as his heir and entered upon "possession of the properties left by him." On that issue the Subordinate Judge found that the adoption was not proved, and the plaintiff, the widow, obtained a decree. On this there was an appeal to the High Court by Nirban Singh. The third ground of the appeal of Nirban Singh says that "the Prin-"cipal Sudder Ameen is wholly wrong in "rejecting the claim of the defendant on the "ground of the deed not having been pro-"duced when its absence has been satisfac-"torily accounted for," the deed being, according to Nirban Singh's own allegation in his written statement, a deed adopting him in the *krittima* form. The learned Judges who decided the appeal, Mr. Justice Loch and Mr. Justice Louis Jackson, observed that, "looking "at the whole evidence before us, we think that "the evidence in support of the adoption is "more worthy of regard than that adduced "by the plaintiff, and under this view we "reverse the decree of the lower Court, and "dismiss the plaintiff's suit with costs." So that the result of the litigation between Tika Singh's widow, Tiluk Kower, on the one hand as plaintiff, and Nirban Singh on the other hand as defendant, was that the adoption of Nirban Singh was considered by this Court to be established in the *krittima* form as alleged by him; and the claim of the widow, which was based on the allegation that no adoption of any kind had taken place, was rejected, and her suit dismissed.

We may observe that, although there was an appeal to the Privy Council, the appeal came to nothing, as it was not prosecuted. We therefore think, looking to the written statement of Nirban Singh in the former suit and to the character of the adoption raised in that suit, as well as to the *factum* of the adoption decided by the High Court against the widow on the written statement and allegation of Nirban Singh and the evidence adduced in that case, that the Subordinate Judge was right in his finding that the adoption of Nirban Singh was in the *krittima* and not in the *duttaka* form. Considerable stress is laid by the appellant on the fact that some of the witnesses examined in this case by the plaintiffs state that certain ceremonies, such as tonsure and investiture of the sacred thread, were performed by Tika Singh when Nirban lived with him as his adopted son. Now, if it were not for the written statement of Nirban Singh himself, there might be some force in this argument, but, when we turn to that written state the fact, that those ceremonies were pe ed and that Nirban was married by Singh and at his expense, becomes of importance, because Nirban admits th was from his infancy brought up by Singh, though he was not adopted by until Tika Singh had despaired of any issue of his own. Therefore we e concur with the Subordinate Judge i finding that the adoption of Nirban w the *krittima* form.

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herefore, without going more minutely the evidence of the case on the merits, ind that the plaintiffs are not in a posi- to question the alienations of Nirban gh, and we confirm the decision of the ordinate Judge, and dismiss the appeal costs payable by the appellants.

The 1st May 1876.

Present:

Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainsle, *Judge*.

Mortgage—Wassilat—Deposit.

Case No. 60 of 1875.

ular Appeals from a decision passed y the Second Subordinate Judge of Patna, dated the 17th December 1874.

Baboo Gobind Pershad and another (Plaintiffs), *Appellants*,

versus

arka Nath, manager of the estate of Dabi Pershad, lunatic, and others (Plaintiffs), *Respondents*.

r. C. *Gregory* and *Baboo Chunder Madhub Ghose* for Appellants.

Baboo Unnoda Pershad Banerjee for Respondents.

Case No. 61 of 1875.

abi Dutt Singh and others (some of the Defendants), *Appellants*,

versus

Baboo Gobind Pershad and another (Plaintiffs), *Respondents*.

Moonshee Abdool Baree for Appellants.

Baboo Unnoda Pershad Banerjee for Respondents.

Where a mortgagor deposits the amount of the mortgage for the express purpose of preventing a foreclosure, he is entitled to wassilat, of which the mere fact of his having put in a petition, which refers to some other suit between him and mortgagee, but does not prevent the latter from taking out the deposit, cannot deprive him. Where a mortgagor is liable for only a portion of the mortgaged property, but pays in the whole amount to secure himself against his co-sharers, he is entitled to wassilat for the whole.

Garth, C.J.—THERE has been only one substantial point argued in this case, *viz.*, whether the petition under which the mortgagor deposited the mortgage-money was in such a form as to prevent the mortgagee from taking the money out, and to deprive the mortgagor of the right to the wassilat from the time when the deposit was made.

It is admitted that, if the petition had been in the ordinary form, so that the mortgagee could clearly have taken out the money at once, the mortgagor would have been entitled to the wassilat which has been awarded him by the Court below; but the petition, it appears, stated that there was another suit pending at the time of the deposit in which the mortgagor, alleging that the mortgagee had realized a sufficient sum from the proceeds of the sale to pay off both the principal and interest of the mortgage-debt, claimed to be entitled to recover the property from the mortgagee, without making him any further payment, and the Government pleader argues on behalf of the mortgagee that this statement in the petition imposed such a condition on the deposit itself as that it prevented him, the mortgagee, from taking out the money.

We cannot consider that this is the true view of the case. There was no condition annexed by the terms of the petition to the deposit of the mortgage-money. The deposit was made in the name of the mortgagee; and there was no reason whatever why he should not have taken out the money so deposited. If he had taken it out, he would undoubtedly have been bound to give up possession of the mortgaged property, or to account to the mortgagor for the wassilat; and the fact of his not having taken out the money, when he might have done so, ought not to place the mortgagor in any worse position.

There are two cases which were referred to in the course of the argument which we think it right to notice. One (Pran Nath

Agency representing the British Government, while by the other he occupied the position of a subject in British territory; and the Government of India having resolved on removing the irritation felt by the Thakoor at this distinction, by transferring the territory under British jurisdiction to the more immediate jurisdiction of the Thakoor, by an agreement under which, however, the transferred territories should revert to the jurisdiction of the British Government in the event of any gross misconduct on the part of the Thakoor, of which misconduct the Government of Bombay was to be the Judge:—

HELD, *firstly*, that, if such a transfer were valid, it would not amount to a cession of British territory to a native State, but would merely amount to a transfer of certain territories from ordinary British to a special local jurisdiction; but, *secondly*, that the transfer in the present case, which was alleged to have been effected by sundry notifications in Government Gazettes, was not valid, because even such a transfer as was contemplated could not legally be effected without a Legislative Act, such as had not been passed in this case: HELD, also, that, as the Governor General in Council is precluded from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, no Legislative Act, purporting to make a Government notification conclusive evidence of a cession of territory, could exclude a judicial inquiry as to the nature and lawfulness of any such alleged cession. HELD, also, that the jurisdiction of the High Court over the territory in question was territorial, and would cease immediately on a valid cession.

IN this suit, which was instituted in the British Court of Gogo for the recovery or redemption of certain land situate in the village of Gangli, on the footing of mortgage, a decree for the plaintiff (whose representatives are the respondents here) was made by the Moonsiff of Gogo, but was reversed on appeal by the Assistant Judge of Ahmedabad. On a special appeal by the plaintiff to the High Court of Bombay, the case was remanded to the Court of Ahmedabad for re-trial.

So far, there was no question of the jurisdiction of these different Courts over the land in controversy, as territorially situate within their proper limits, and over the parties to the suit as resident within the same limits. But in 1866, after the remand by the High Court, the jurisdiction of all these Courts is alleged by the appellant to have ceased by reason of the cession by the British Government of certain territory, within which Gangli was included, to a native potentate, the Thakoor of Bhownuggur. A notification that the territory so alleged to have been ceded was removed, from and after the 1st of February in that year, from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency, appeared in the "Bombay Government Gazette" of the 29th January 1866. The District Judge of Ahmedabad proceeded, nevertheless, to rehear the appeal, and, on such rehearing, he restored the original judgment of the M siff of Gogo in favour of the pl Thereupon the defendant brought an special appeal to the High Court of Bo alleging the notification in the Gazet the 29th January 1866 as proof that rehearing had been *coram non judice*; the High Court, on the 2nd December a rejected this special appeal, holding notification to be insufficient to show the jurisdiction of the Court of Ahmeda had ceased before the rehearing. O petition, however, by the defendant fo review of that order, accompanied by further documentary evidence, the H Court appears to have considered (Rec p. 191) that a transfer of lands from Bri territory to the jurisdiction of a na Prince, by the authority of the Secretary State for India, might have been autho by the Statute 21 and 22 Vic., cap. sec. 3; and a review of the order of 2nd December 1870 was therefore direct On the review, the Judges of the H Court held that it was beyond the po of the British Crown, without the co currence of the Imperial Parliament, to ma any cession of territory within the jurisdi tion of any of the British Courts in Indi in time of peace, to a foreign power; a on that ground they made the order of 24th March 1873, now under appeal, co firming their former order of the 2nd Dece ber 1870. The question, whether the l thus laid down by the High Court Bombay is correct, was fully and ably argu at this bar in July last; and their Lordshi would have been prepared to express th opinion, which they might have formed up it, if, in the result of the case, it had beco necessary to do so. But, having arrive at the conclusion that the present appe ought to fail, without reference to th question, they think it sufficient to sta that they entertain such grave doubts (t say no more) of the soundness of the gener and abstract doctrine laid down by the Hig Court of Bombay as to be unable to advis Her Majesty to rest Her decision on that ground.

Before, however, the judgment rejecting the special appeal to the High Court of Bombay can be reversed, their Lordships must be satisfied that there was, in this case, an actual cession of territory, which had the effect, before the rehearing by the District Judge of Ahmedabad, of depriving Gangli of the character of British territory, and its inhabitants of the status and rights of

British subjects. That question, considered as one of fact in this particular case, apart from the general constitutional question as to the power of the Crown to make a cession in any case, does not appear to have been so fully considered by the High Court of Bombay as their Lordships think it deserved to be. It has now (on the 17th of February last) been the subject of a separate argument at this Bar.

The facts material to the determination of this question may be thus stated:—

There are in the Province of Kattywar one or more talooks of large extent and value belonging to the Thakoor of Bhownuggur, which (whether that province ought or ought not to be regarded as a part of Her Majesty's dominions) have never been brought under the ordinary administration of the British Government in India. The Thakoor is also the proprietor of other large talooks (the town and port of Bhownuggur, and many other villages and places, including Gangli), forming part of the districts of Dundooka and Gogo, &c., which, having previously been part of Kattywar, were ceded by the Peishwa to the British Government in 1802 by the Treaty of Bassein. The territory so ceded was left, till 1815, under native administration; but in that year it was brought under the ordinary jurisdiction of the British Courts of the Bombay Presidency, and so remained until those proceedings in 1866, the effect of which is now in question. As to these latter estates, the Thakoor, and all his dependents residing thereon, were (beyond controversy) subject to British law and jurisdiction.

Before 1802 the whole Province of Kattywar was divided between the Peishwa and the Guikowar, who claimed over it sovereign rights, chiefly consisting in the exaction of tribute. A small number of estates in the province were held rent-free; but for the greater part the Chieftains paid tribute of the same character (so far as their Lordships can judge) as the land-revenue which is paid to the Government in British India; and Mr. Aitchison, in a work of authority, referred to on both sides at the Bar ("Treaties," Vol. VI., p. 366), states that the sovereignty of the country was understood by the Chiefs to reside in the power to which this tribute was paid. The rest of the rights of the Peishwa, in those parts of Kattywar which had not been transferred to the British Government by the Treaty of Bassein, were ceded to Great Britain in 1817.

With respect to the Guikowar (leaving out of consideration one or more talooks of which that Prince is at the present day the direct proprietor), it appears that in 1807 a settlement was made between the Guikowar and the Chiefs tributary to him through the intervention and under the guarantee of the British Government; engagements being then taken for the payment of a fixed revenue by those Chiefs whose estates were not held rent-free. The amount of tribute then fixed for the Kattywar estates of the Thakoor of Bhownuggur was 74,000 rupees; and as it was thought expedient to consolidate the whole of the claims over all the Thakoor's estates, an agreement was made, with his consent, for the transfer of the revenue payable by him to the Guikowar for his Kattywar estates to the British Government as part of the consideration for certain arrangements which were at the same time made for the support of a contingent force. In 1820, by a further agreement, the Guikowar engaged to send no troops into Kattywar, and to make no demands upon the province, except through the British Government. Since that date, the supreme authority in Kattywar (as far as it had been previously vested in the Peishwa, or in the Guikowar) has been exercised solely by the British Government. The tribute payable by the different Chiefs has been collected by the British authorities; the Guikowar receiving from them the share of it, to which he is entitled according to the existing agreements. The tribute payable in 1871 by the Thakoor of Bhownuggur (in respect of the aggregate of his Kattywar estates, and of the estates included in the alleged cession of 1866) is stated in the "Kattywar Local Calendar and Directory" of that year (a book referred to during the last argument as containing correct information on public matters relating to the province) as amounting in the whole to Rs. 1,54,917 per annum; of which Rs. 1,28,060 were collected in right of, and retained by, the British Government; Rs. 3,999 were collected in right of, and paid over to, the Guikowar; and the sum of Rs. 22,858 was a customary sub-tribute paid under the name of "Zortullubee" to the Nawab of Joonaghur, one of the Chiefs of the province, who appears formerly to have established some kind of superiority over the rest.

Their Lordships have now to refer to the

judicial administration of Kattywar. Down to 1831, this appears to have been left, without any regular control, in the hands of the Chiefs. But, in that year (a "Political Agency" having been established at Rajcote in 1820), the British Government constituted a Criminal Court of Justice in Kattywar, under the presidency of the Political Agent, with three or four Chiefs as assessors, for the trial of capital crimes in the estates of Chiefs who were too weak to punish such offences, and of crimes committed by petty Chiefs upon one another, or otherwise than in the exercise of their recognized authority over their own dependents. Until 1853, every sentence passed by this Court was submitted to the Bombay Government for their approval. (Aitchison, Vol. VI., p. 367.) In 1862, the whole of this administration was re-organized. The province was then divided into four districts (the eastern district including all the Talooks belonging to the Thakoor of Bhownuggur), in each of which were placed officers, called "Political Assistants," with other British Magistrates under them, all under the control of the Political Agent. The entire number of Kattywar States under separate Chiefs (large and small) is 188; of whom 96 pay tribute to or in right of the British Government only; 70 to or in right of the Guikowar only; and nine (of whom the Thakoor of Bhownuggur is one) to or in right of both Governments ("Kattywar Directory," pp. 54-56). These Chiefs were, by the arrangements made in 1862, distributed into seven different classes. To the first class (consisting of four or five, of whom the Thakoor of Bhownuggur is one), unlimited criminal and civil jurisdiction, with the exception of criminal jurisdiction in certain cases over "British subjects" (however that expression ought to be interpreted) was allowed. The jurisdiction of the second class (either originally, or by the effect of a Circular Order afterwards issued, No. 14 of 1866) was substantially the same. The jurisdiction of the four next classes was restricted, in criminal matters, to limited powers of fine and imprisonment; and in civil matters, to the cognizance of suits of limited amount; the greatest powers (those of the Chiefs of the third class) being to imprison for seven years, to impose fines of Rs. 10,000, and to decide civil suits of Rs. 20,000 value; while the sixth class could only imprison for three months, impose fines of Rs. 200, and decide civil suits of Rs. 500 value. The seventh, or lowest class of all, was entirely deprived of all civil jurisdiction, but, in criminal cases, m imprison for not more than fifteen days, impose fines not exceeding Rs. 25. All o jurisdiction, both civil and criminal thro out the province beyond the limits of allowed to the Chiefs, was reserved to British Officers and Magistrates under authority of the Political Agent; and 1871, there was an establishment of th one such Officers and Magistrates in whole. ("Directory," pp. 520-527.)

In 1863, two elaborate Codes of Reg tions (based upon the Indian Penal and c Codes) were promulgated with the sanc of the Indian Government for the guid of the British Judicial Officers and Ma trates in Kattywar. ("Directory," pp. 1 253.) These Codes established, both name and in substance, regular and f organized Courts of Justice, with power execute warrants and issue commiss throughout the province, and to take secu from suspected persons in the name of Queen. (Articles 39, 55, 154 of the Cri nal, and Article 104 of the Civil, Co It may be added that, on the face of th Codes (especially by Article 10 of the C Code, which pointedly distinguishes Chiefs of Kattywar from "Sovereign Powe and "Independent Chiefs"), and by seve later Circular Letters of the Political Age (No. 11 of 1866, No. 2 of 1867, No. 11 1869, and that of the 7th May 1868) whole jurisdiction exercised by the Chiefs all the seven classes is treated as confer upon them by the British Government.

These being the circumstances which th Lordships think material to a correct und standing of the arrangements between Indian Government and the Thakoor Bhownuggur, and of the steps taken to ca them into effect, it now becomes necessary advert to those arrangements. It appe that the difference between the position the Thakoor in his Kattywar estates, which he continued to exercise his anci powers, paying a fixed revenue, and h position in his British estates (including h two largest towns and his place of residenc in which, since 1815, he had been subject ordinary British laws, was (in the langua of Mr. Aitchison, Vol. VI., p. 374) "ve irritating to him." With a view (amo other things) to remove or diminish th source of discontent, an agreement was con cluded between him and the Indian Govern ment in 1860, which is printed at pp. 416-20 of the same volume of Mr. Aitchison's work.

It is entitled "Settlement framed according to Resolutions of the Bombay Government, Nos. 3826 and 3829, dated 23rd October 1860"—a title which has the aspect of an agreement as to rent and other terms of tenure, rather than that of a treaty between the head of a Sovereign State and a Foreign or Independent Power. When the particular terms of this agreement are examined, they confirm that impression.

By the 1st and 8th articles, the Thakoor of Bhownuggur and the British Government reciprocally agreed to cancel, from and after the 1st May 1861, "the lease of the villages of the Thakoor's talooks in the districts of Dundooka, Ranpore, and Gogo, which was executed in A. D. 1848," and "instead thereof, the Thakoor agreed to pay, for the whole of the villages enumerated in that lease, a fixed jumma of Rs. 5,200 yearly for ever," which sum "shall not be, in any way, affected by the result of any action or other process brought by any party against the Thakoor's right of possession, in any part of the said talooks; nor shall the said estates (excepting Bhownuggur, with Wudwa, Sehore, and the ten villages thereof about to be attached to Kattywar) be exempted on account of this payment from any general taxation, not coming under the head of land tax or rental, which Government may impose on their districts under the Regulations."

It appears, therefore, that the talooks in Gogo, including Gangli, which were "about to be attached to Kattywar," had been included in the lease of 1848, which was then to be cancelled; and that, although the Government did not reserve, as to those particular talooks, the same right of "general taxation" which they expressly reserved as to the residue of the Thakoor's British estates, which were intended to continue subject to the Bombay Regulations, still those talooks were included in the estates in respect of which a fixed jumma of Rs. 5,200 was to be paid in perpetuity by the Thakoor.

By the 2nd article, the Thakoor agreed (certain questions of account between himself and the British Government being thereby adjusted) "to pay up his Kattywar tribute (*i.e.*, the jumma for his Kattywar property, which had been fixed in perpetuity in 1807), yearly in full, according to settlement."

By the 3rd and 9th articles it was reciprocally agreed that the port dues and customs of the port of Bhownuggur should continue to be collected at British rates, and by the British Government; but that, when collected, the whole net produce of the port dues, and three-fifths of the net produce of the customs (as "the share of the Thakoor") should be paid over to the Thakoor by the Government, who were to retain, as "the share of Government," the other two-fifths of those customs.

The town and port of Bhownuggur were part of the territory to which the 7th article (that directly bearing upon the present question) relates. That article is in these words: "Upon the above conditions Her Majesty's Government agree as follows: Government concede, as a favour, and not as a right, the transfer of Bhownuggur itself, with Wudwa, Sehore, and ten subordinate villages, from the district of Gogo, subject to the Regulations, to the Kattywar Political Agency."

This is not the language of cession. It is *primâ facie* nothing more than an engagement for the transfer of the places mentioned (including Gangli), which were then, beyond question, British territory, from a Regulation Province to an extraordinary jurisdiction. The other articles are consistent with this view.

After the conclusion of this agreement in 1860, a delay of some years followed before anything was done with a view to give effect to the provisions of the 7th article; "owing" (as Mr. Aitchison states, Vol. VI., p. 374) "to some doubts as to the precise status of Kattywar with respect to British laws." In 1865, however, the Thakoor pressed for the completion of the arrangement. In the letter from the Secretary to the Government of India of the 31st of May 1865 to the Acting Secretary of the Government of Bombay (printed at page 181 of the Record), the measure is described as "the contemplated transfer of the town of Bhownuggur, of the district of Sehore, and of the villages in Dundooka and Gogo, to the supervision, laws, and regulations of the Kattywar Political Agency." By that letter the Governor-General in Council authorized "the contemplated arrangement" being at once carried into effect, with the reservation, however, for which the Government of Bombay were directed carefully to provide that, "in the event of gross misconduct on the part of the Thakoor" (of which the Government of Bombay were to be the judges), "these territories should revert." A reason was added for holding that "the projected transfer would have been legalized" by the agree-

ment of 1860; *viz.*, that "Her Majesty's Secretary of State for India had decided that Kattywar was not British territory."

Their Lordships think that, if such an opinion had been expressed by the Secretary of State for India (of which no direct evidence is found in the papers before them), and if that opinion could be proved to be well founded, it would still not have the effect of converting a transfer of certain British territories from ordinary British jurisdiction "to the supervision, laws, and regulation of the Kattywar Political Agency," into a cession of British territory to a Native State. Such a cession would be a transaction too important in its consequences both to Great Britain and to subjects of the British Crown, to be established by any uncertain inference from equivocal acts.

Their Lordships assume (though the precise language used does not seem to be quite apt for that purpose) that what was intended was to confer upon the Thakoor of Bhownuggur, within the "transferred" districts, as large a criminal and civil jurisdiction as that which he exercised in his estates situate within the proper limits of the Kattywar Political Agency, subject only to the same supervision and control of the Kattywar Political Agent to which he was subject in respect of those estates.

But such a grant of jurisdiction (if the Government of India or the Crown, without a Legislative Act, had been able to grant it) would not have deprived the Crown of its territorial rights over the "transferred" districts, or the persons resident therein of their rights as British subjects. Whatever may have been the opinion of the Indian Government as to the effect of what was done (concerning which their Lordships will only observe that the documents of 1870 and 1871, printed at pp. 185 and 184 of the Record, take it for granted that a cession of territory to a Native State had been made, which is the point to be determined), their Lordships' judgment must be founded, not on mere opinions, but on facts; and they find, in point of fact, that there was no cession of territory in this case, unless it can be deemed to have been made by the agreement of 1860, or by the notification in the Bombay Government Gazette of the 29th January 1866 (issued, no doubt, in obedience to the directions of the Indian Government, contained in the letter of the 31st May 1865); which merely declared that, "in accordance with the Convention, &c." (*i.e.*, with the agreement of 1860), the villages in question were, "from and after the 1st of February 1866, re from the jurisdiction of the revenue, and criminal Courts of the Bombay dency, and transferred to the supervi the Political Agency in Kattywar, same conditions as to jurisdiction villages of the Talooka of the Thak Bhownuggur heretofore in that prov (Record, p. 176.)

Their Lordships agree in the reasons by the Judges of the High Court of Bo on the 2nd December 1870 for holdin notification insufficient for the purpose i ed; and they are unable to find, in any other documents afterwards submitted t Court on the application for a review, good reason for the subsequent depart the High Court from that opinion, so f to admit a review. The second notific of the 4th January 1873, which appe in the "Indian Gazette" after the re had been ordered, also left the case sub tially where it stood before. That not tion was merely to the effect that villages mentioned in the schedule "w on the 1st February 1866, ceded to State of Bhownuggur." The nature effect of the act, so described as a "ce to the State of Bhownuggur," remains it was before) a proper subject for judi inquiry. What was attempted was, in t Lordships' judgment, neither more nor than a re-arrangement of jurisdictions wi British territory, by the exclusion o certain district from the Regulations Codes in force in the Bombay Preside and from the jurisdiction of all the H Courts, with a view to the establishm therein of a native jurisdiction, under Br supervision and control. But this could be done without a Legislative Act, whi in this case, was never passed. By Imperial Statute, 3rd & 4th Wm. IV., c 85, section 43, a general power of legi tion (with certain exceptions not mate for this purpose) was given to the Govern General in Council as to (among other thin "all Courts of Justice, whether establish by His Majesty's charters or otherwise, a the jurisdiction thereof." This power is, substance, continued by 24 and 25 Vict cap. 67, section 22, though the particula clause of the former statute is repealed. By the 24th and 25th Vict., cap. 104, section 9, the High Courts of the several Presidencies were established with such jurisdiction as Her Majesty should, by Her Letters Patent, confer upon them; and, under the same statute, each of those Courts was also to have

and to exercise, "save as by Her Majesty's Letters Patent might be otherwise directed, and subject to the Legislative powers, in relation to the matters aforesaid, of the Governor-General in Council," all jurisdiction, power, and authority previously vested in any of the East India Company's Courts within the same Presidency, which were abolished by that Act. It is unnecessary to refer to later enactments, which only modified these provisions, in a way not affecting the present case. The jurisdiction, therefore, of the Courts of the Bombay Presidency over Gangli rested, in 1866, upon British Statutes; and could not be taken away or altered (as long as Gangli remained British territory), so as to substitute for it any native or other extraordinary jurisdiction, except by legislation, in the manner contemplated by those Statutes.

Upon two subordinate points in this case, their Lordships think it right to add that they agree with the view taken by the High Court of Bombay.

Nothing, in their judgment, turns in this case upon the Indian Evidence Act of 1872, section 113. The Governor-General in Council being precluded by the Act 24 and 25 Vict., cap. 67, section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any Legislative Act, purporting to make a Notification in a Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession. And with respect to the competency of the Courts of the Bombay Presidency to proceed with the suit between these parties, if Gangli had, by any valid cession, ceased to be British territory, their Lordships agree with the High Court that the foundation of the jurisdiction of those Courts over the subject-matter of this suit, and the parties thereto, was territorial, and that it could no longer be exercised (whatever might be the stage or condition of the litigation at the time), after such a valid cession had been made.

Their Lordships will humbly advise Her Majesty to dismiss the appeal.

The 3rd April 1876.

Present:

The Hon'ble F. A. Glover, *Judge.*

Registration—Prima-facie Proof.

Case No. 1253 of 1875.

Special Appeal from a decision passed by the Officiating First Subordinate Judge of Chittagong, dated the 24th March 1875, reversing a decision of the Moonsiff of Satkoniah, dated the 21st September 1874.

Nittyanund Kur and others (Plaintiffs), *Appellants,*

versus

Raj Bullubh Adyapurahit (Defendant), *Respondent.*

Baboo Aukhil Chunder Sen for Appellants.

Baboo Sreenath Banerjee for Respondent.

A Subordinate Judge having set aside the decision of a Moonsiff on the ground, *inter alia,* that it was improbable that the defendant would have executed a kubooleut in which his rent was suddenly raised to about three times the rate at which he had formerly paid, the Moonsiff's order was restored on the ground that the registration of the kubooleut, with all the due formalities, was *primâ-facie* proof of the truth of its contents; and that, as this proof was not rebutted by defendant, the Moonsiff had been right in acting on it.

WHETHER the Moonsiff was justified or not in admitting the application for review was a matter which the Subordinate Judge had no power to inquire into. The application was made within the ninety days prescribed by law, and it having been so made, the order for refusing or admitting the

review was final. That being so, we must look upon the first Court's judgment as properly made upon the documents admitted by the Moonsiff on review.

With regard to the kubooleut, the Subordinate Judge has refused to admit it, because he considers it extremely improbable that the defendant, who had originally held the land at a jumma of Rs. 4-6, would consent to execute a kubooleut, agreeing to pay a jumma of Rs. 14. In coming to that conclusion, he has, and I think incorrectly, refused to consider the effect of the documents which the first Court allowed to be put in, and on which he based its judgment. But setting that aside for the moment, has the Subordinate Judge decided the case rightly upon the facts as they were before him irrespective of those documents? He has decided against the kubooleut, because he considers that it is not unlikely that the kubooleut was fabricated and registered. Now, by section 68 of the Registration Act (XX. of 1866), under which law this case would come, it is laid down that, where a document has been registered after compliance with the provisions contained in section 36 of the Act, one of which is that, if a party who professes to execute the document appears before the Registrar and admits execution, and if the Registrar not knowing that party personally, is satisfied after inquiry that the identification by a witness who comes for the purpose of identifying is genuine, he shall endorse on the document a certificate containing the word "registered," and such certificate shall be signed, sealed, and dated by him, and shall then be *primâ-facie* evidence that the document has been duly registered in manner provided by the Act, and that the facts mentioned in the endorsement have occurred as therein mentioned. Now, the facts mentioned in the endorsement upon this kubooleut are that Raj Bullubh Surma, who was the executant of the document, himself came forward before the Registrar and admitted execution, the Registrar being satisfied by the statement of the mookhtear who came for the purpose of identification that the real Raj Bullubh was before him. This endorsement of the Registrar is, therefore, *primâ-facie* evidence by law that Raj Bullubh came before him and made the admissions referred to. And it was for the defendant in this case to rebut the evidence, which the endorsement made by the Registrar, made in favour of the plaintiff. It is nowhere contended by the defendant that he adduced anything to rebut this evidence. It is said that the mookhtear ought to been sent for and examined. It might been better if the plaintiff had sent for examined the mookhtear; but, as the law that what had already been certified by Registrar was *primâ-facie* evidence of fact that the defendant Raj Bullubh admit the execution of the kubooleut, it for the defendant, if he thought it proper send for the mookhtear and examine At all events it was for the defendant rebut the *primâ-facie* evidence already in favour of the plaintiff. My own opi is (over and above this finding, which sufficient to reverse the decision of Subordinate Judge), that, as the docum which were accepted by the Moonsiff legally on the record, the Subordinate Ju was bound to consider them. These do ments, of the genuineness of which there be no possible doubt, show that the pre cessors of the plaintiff brought a suit aga this very defendant and got a decree, and default of payment of the decretal mo within fifteen days, got khas possession the land. The Subordinate Judge says it is improbable that a tenant would sub to such a large increase to his rent; b must not be forgotten that his position been very much altered for the worse. may be that he paid Rs. 4-6 in previ years, but the landlord having got h possession under his decree would natur insist on higher terms and treat the te as a mere holder at will, whose rights in land had been extinguished. There is noth therefore so very improbable in the fact the defendant should have executed kubooleut at a higher rate; and as by the endorsement of the Registrar is *pri facie* evidence of the fact that the kubo was executed by the defendant, and as defendant has not given any evidence wh ever to disprove the fact that he was pre before the Registrar and admitted the exec tion of the kubooleut, I think that Subordinate Judge was wrong, and that plaintiff is entitled to keep the decree whi the Moonsiff gave him. The decision of t Subordinate Judge will, therefore, be reve ed, and the order of the first Court restor with costs.

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The 1st May 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Contribution—Mesne-profits.

Case No. 2877 of 1874.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 9th June 1874, reversing a decision of the Moonsiff of Mozufferpore, dated the 13th August 1873.

Bunwaree Lall Sahoo (Defendant), *Appellant*,

versus

Sudhist Lall (Plaintiff), *Respondent*.

Mr. R. L. Sandel for Appellant.

Baboo Rajendro Nath Bose for Respondent.

In a claim for contribution arising out of a former suit in which a District Judge had given a decree against the present plaintiff and defendant, and in the execution of which the Moonsiff had allowed mesne-profits to the plaintiff, although the Judge's decision, which entered fully into other details, had omitted to award mesne-profits: HELD that, as the Judge's decision had made no mention of mesne-profits, the present plaintiff was not entitled to recover, as contribution, the sum which, in order to secure his property against the joint decree, he had paid on behalf of the defendant.

Garth, C.J.—In this case the plaintiff claims contribution from the defendant under these circumstances:—

A suit was brought in the year 1868 in the Civil Court of the district of Tirhoot by one Ram Lall Jha *vs.* the present defendant, the present plaintiff and other persons—in which suit the plaintiff claimed possession of certain property as against the present plaintiff and defendant, and also made a further demand of Rs. 150 for mesne-profits.

In this suit the plaintiff, on appeal to the District Judge, was eventually successful, and the Judge, in giving judgment, went very fully into his reasons for considering the plaintiff entitled to possession of the property—against the present plaintiff and defendant—and eventually made, in a general form, a decree against them, but without saying a word, or making any order, as to the claim for mesne-profits.

The plaintiff in that suit then applied in the Moonsiff's Court to obtain execution against the present defendant for the mesne-profits, upon the ground that they were intended to be given by the Judge, though not expressly mentioned; but this application was unsuccessful, upon the ground that no order had been made as to mesne-profits.

Another application was then made to the same Moonsiff by the plaintiff in that suit against the present plaintiff, and on that occasion it is said that the District Judge sent a verbal message to the Moonsiff that he intended to give mesne-profits. If any such message was sent, it was undoubtedly very wrong and irregular, and should have had no effect on the Moonsiff's mind; but however, whether from this, or any other cause, the Moonsiff made an order for execution against the property of the present plaintiff.

In order to protect his property from this execution, the present plaintiff paid the whole sum claimed for mesne-profits, and he now brings this suit against the defendant for half the sum which he so paid by way of contribution, and the District Judge has held on appeal that he is entitled to recover.

From this decision the defendant has appealed on the ground that the decree in the former suit made no mention whatever of mesne-profits, and that, according to the fair construction of that decree, it is impossible to say that the Judge intended to give any mesne-profits; and we are of opinion that this is the right view of the case.

We are bound, of course, to put a reasonable construction upon the decree; and if we could fairly gather from it that the Judge intended to award mesne-profits against the plaintiff and defendant, although he may not have expressed himself very clearly, we should be disposed to give effect to his intention.

But the Judge, in awarding upon the other parts of the claim, gives his reasons very fully for doing so, and not only is he perfectly silent as regards the claim for mesne-profits but we cannot gather from anything he says that he intended to give them, and it is quite consistent with his ultimate decree that he did not intend to do so.

Upon the principle, therefore, which was laid down in a decision of the Full Bench, Mosoodun Lall *vs.* Beekharee Singh and others, 6 Weekly Reporter, Miscellaneous Rulings, 109, we think that we have no right to import into the decree as against the present defendant that which neither

expressly nor by implication appears therein, and consequently we must reverse the decision of the Lower Appellate Court, and restore that of the Moonsiff dismissing the plaintiff's claim.

The appeal will be decreed with costs in both Courts.

The 2nd May 1876.

Present :

The Hon'ble W. Ainslie and G. G. Morris, *Judges.*

Mesne-profits—Assessment.

Case No. 9 of 1876.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Dinagepore, dated the 25th September 1875.

Mussamut Bibee Meher Jan (Decree-holder), *Appellant,*

versus

Mussamut Bibee Gerda and others (Judgment-debtors), *Respondents.*

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Appellant.

Mr. R. E. Twidale and *Moonshee Serajul Islam* for Respondents.

Although the assessment of mesne-profits is reserved for the period of execution of decree, it is an essential part of the decree itself, and not a mere process in execution, and must, therefore, be made by a Court authorized to pass the decree.

Ainslie, J.—THIS is a case in which properties situated in the districts of Purneah and Dinagepore were sued for in one suit. This Court authorized the Judge of the district of Purneah to hear and dispo the suit. There was an application mesne-profits from 1262 to 1273, and from the date of possession. The d is not very precise in its form. It is necessary or proper for us to state at time what is its effect. The assessme mesne-profits, for whatever period they allowed, was reserved under section Civil Procedure Code, to be made in course of the execution of decree.

It has been determined in several c and we have no doubt upon the point, the assessment of mesne-profits is an esse part of the decree itself. It is not a ceeding in execution, and is, therefore, thing which must be done by the C which was authorized to make a decr the case. The Purneah Court seem have treated this matter as a mere proc ing in execution, and to have transfe the decree to the Dinagepore Court, not for the purpose of giving possession to plaintiff, but also for the purpose of deter ing the amount due to him for mesne-pr

After a prolonged inquiry, the Dinage Court has determined that a certain su due to the plaintiff decree-holder. Court has disallowed a certain portio the decree-holder's claim ; but, on the c hand, it has allowed certain items which objected to by the judgment-debtors.

Both parties have come before us their appeals. Although this litigation been so long protracted, we think the course which we can adopt is to send case down to the Court at Purneah, in c that that Court may complete its de by declaring the sum which the de holder is entitled to as mesne-profits. W that decree has been so completed, it wi capable of being transferred for execu to the Dinagepore Court, or to any c Court within whose jurisdiction the prop of the judgment-debtor may lie. We not at liberty to amend the order of Dinagepore Court, because it is an ord a Court which had absolutely no jurisdic in the matter, and which must, therefore treated as a nullity.

The proceedings and evidence taken fore the Dinagepore Court will, by the sent of the pleaders on both sides g before us here, be treated as evidence by Purneah Court, and that Court will, as s as possible, carry out our order and comp its decree.

We think that each party should bear own costs of this appeal.

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The 2nd May 1876.

Present:

he Hon'ble E. G. Birch, *Judge.*

ement—Time and Manner of enjoying Easement.

Case No. 2088 of 1875.

al Appeal from a decision passed by Officiating Judge of Shahabad, ed the 27th July 1875, reversing a ision of the Moonsiff of Sasseeram, ed the 25th March 1875.

nessur Misser and others (Defendants), *Appellants,*

versus

[Brojo Bhookun Misser (Plaintiff), *Respondent.*

boos Anund Gopal Paleet and *Chunder Madhub Ghose* for Appellants.

onshee Mahomed Yusuf for Respondent.

a suit for the recovery of a right of easement in a that had been closed up, in which the Moonsiff that a drain had existed which had recently been , and that there was no other way whereby water escape from plaintiff's land, and accordingly the plaintiff a decree which was upheld by the e: HELD that the real issue to be tried was, whether laintiff had enjoyed the easement for the time (20 s) and in the manner laid down in the law.]

HE objection urged in special appeal in case is that the Courts below have mis-rehended the nature of this suit and the e which has to be tried; and that in sequence of the way in which this suit been tried, there has not been a proper ding as to whether the plaintiff had ac-ired the right of easement which he sets .

It is clear from the Moonsiff's judgment at he mainly based his finding upon the vestigation which he held upon the spot, hen he appears to have had some land dug up, and to have come to the conclusion from the state of the earth so turned up that the drain had been newly stopped by the defendants. Then the Moonsiff goes on to say that there is no other outlet by which the water of the plaintiff's house could be drained off. Then he says that the allegation of the defendants that no drain existed, is found to be wholly false. He comes to the conclusion that the plaintiff's claim is just and proper, and decrees the case, requiring, by his decretal order, that the plaintiff should construct the drain in question pukka with stones or bricks, and cover the same, so that no loss may accrue to the defendants.

Upon appeal, the Judge, after commenting upon the improper reception of some evidence by the Moonsiff, considers that the inspection of the premises by the Moonsiff and the conclusion arrived at from such inspection, was of great importance, and had materially assisted him in arriving at a correct conclusion on the case. The Lower Appellate Court also finds that the defendants' plea is false. The Judge, therefore, confirms the finding and decree of the Moonsiff.

I think, as has been contended for by the learned pleader who appears for the appellant, that the real issue to be decided in this case has been overlooked by both the lower Courts. It is not sufficient for the plaintiff to say that he has used this drain and that he has been deprived of that use by some acts of the defendants. Cases of this nature have to be considered with reference to the provisions of section 27 of Act IX. of 1871, which says, that "where any way or water-"course or the use of any water or any other "easement (whether affirmative or negative) "has been peaceably and openly enjoyed "by any person claiming title thereto as an "easement and as of right without inter-"ruption and for twenty years, the right to "such access and use of light, or air, way, "watercourse, use of water or other ease-"ment shall be absolute and indefeasible." The real point for trial in this case was whether the plaintiff had enjoyed this easement over the land of the defendants for the time and in the manner laid down in this section. It seems to me that there has been no trial of the real issue between these parties. I reverse the decisions of both the lower Courts, and remand the case to the Court of first instance in order that the Moonsiff may try this suit, after framing the issues with reference to the provisions of the section above referred to. Costs to abide the ultimate result.

The 2nd May 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt., Chief Justice*, and the Hon'ble C. Pontifex, *Judge.*

"Suit for Land"—Jurisdiction—Trust.

Appeal from a decision passed by the Hon'ble J. B. Phear, one of the Judges of this Court, exercising the Original Civil Jurisdiction, dated the 2nd February 1876.

Delhi Bank (Plaintiff), *Appellant,*

versus

Wordie and another (Defendants), *Respondents.*

The Advocate-General and *Mr. G. H. P. Evans* for Appellant.

Messrs. J. T. Woodroffe, C. C. Macrae, Branson and *Macgregor* for Respondents.

Where one of two co-sharers in certain lands, acting under a power-of-attorney, had conveyed the property of the other to a creditor, under a trust for the conversion of all the said property including the above mentioned lands into money, for the satisfaction of the debts due by the other co-sharer, and the latter denied the right of the former to make such a disposition of his property under the power-of-attorney: HELD that the suit was essentially a "suit for land" in the mofussil which the High Court on its Original Side had no jurisdiction to try.

Garth, C.J.—IN this case we think that the judgment of the Court below should be affirmed, upon the ground that the Court had no jurisdiction to entertain the suit.

The plaintiff's Bank were, at the commencement of the year 1875, creditors of the defendants, Morrell and Lightfoot, to a very large amount.

Morrell and Lightfoot were the owners at that time of certain lands in the districts of Backergunge and Jessore, Morrell being entitled to a 14-anna share, and Lightfoot to a 2-anna share in those lands. Morrell and Lightfoot were indebted, at that time, to several creditors, and the defendant Lightfoot had left this country and given Morrell certain powers-of-attorney to act for him during his absence.

In this state of things, on the 14th of May 1875, Morrell, acting not only for h but professing to act for Lightfoot also the powers-of-attorney, executed in C a deed, by which he conveyed the said (amongst other property) to the defe Wordie and Longmuir, in trust to such part of the property as consi money, and to sell and convert into all the rest of the property includi said lands, and out of the money so realized to pay the creditors of Morrell Lightfoot, either in full or rateably, as the money would go.

The defendants Wordie and Long took upon themselves the trust of the and appointed Morrell their agent to m the property until the sale, under direction.

The trustees, however, found consid difficulty in carrying out the trusts; and defendant Lightfoot, upon hearing of deed, repudiated the transaction altog and denied, and still denies, Morrell's a rity to deal thus with his share of the perty under the powers-of-attorney.

Upon this Wordie and Longmuir unwilling to proceed any further in the cution of the trusts, and were desire being discharged from their responsib under the trust-deed; whereupon the pl iffs, as creditors largely interested that deed, instituted this suit, praying the trusts of the deed might be carried effect; that the trustees might be reli from the execution of the trusts; and th receiver or manager might be appointed carry out the trusts under the order of Court.

To this suit an objection has been raise behalf of the defendants Morrell and L foot, that the Court have no power to e tain such a suit, inasmuch as it is "a for land" within the meaning of the clause of the Charter, the land being ated in the mofussil.

The plaintiffs contend that this is not that the lands which are sought to be af ed are only a portion of certain partner properties belonging to Morrell and Li foot; and that the object of the suit merely to enforce the carrying out of a tr created by Morrell for the joint benefit Lightfoot and himself, and in order to effe a beneficial arrangement with their jo creditors.

In support of this view several authoriti have been cited on behalf of the appellants, all founded more or less upon the princip laid down by Lord Hardwick in Penn v.

Lord Baltimore, and in the notes upon that case in 2 White and Tudor's Eq. Cases, page 780, that Courts of Equity will exercise their powers *in personam*, in the case of trustees and others, resident within their jurisdiction, to oblige such persons to perform trusts, to carry out contracts, and to obey the rules of equity, even where the subject-matter of the trust or contract or equity may be land situate out of their jurisdiction (see Bagram *vs.* Moses, 1 Hyde 284, and Paget *vs.* Ede, 1 L. R., Eq., 118).

But those cases are all more or less distinguishable from the present, which depends not so much upon the jurisdiction generally exercised by Courts of Equity as upon whether this suit is brought substantially "for land," that is, for the purpose of acquiring title to, or control over, land, within the meaning of a particular clause in the Charter; and we think, having regard to what is the real object of the suit, and to what are the rights and contentions of the respective parties, it is impossible to say that this is not substantially a "suit for land."

The express purpose of the suit is to compel the sale of the whole of the lands conveyed by the trust-deed, including Lightfoot's share; but then Lightfoot objects that his share is not subject to the trust at all, because Morrell had no power or authority to deal with it; and, therefore, one of the main points which the plaintiffs seek to establish, and which they ask the Court to decide, is the title of the trustees to Lightfoot's share. Surely, in that respect, the suit is strictly speaking one "for land."

But then the plaintiffs say that is not the sole or primary object of the suit; and that as regards Morrell's share in the property, which is by far the largest portion of it, there is no question as to the trustee's title. But it was repeatedly, during the argument, put to the learned Counsel for the plaintiffs, and distinctly admitted by them, that it would be impossible for the Court to deal effectually with the case, unless Lightfoot's share were included, as well as Morrell's.

That being so, and the suit being confessedly instituted for the purpose of dealing with the lands in their entirety, and those lands being by far the larger portion of the partnership assets, we are of opinion that this is in substance a suit for land within the meaning of the clause in question, and that the judgment of the Court below was perfectly correct.

The appeal will, therefore, be dismissed with costs on scale No. 2.

The 2nd May 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble C. Pontifex, *Judge*.

Breach of Contract — Damages — Rate of Damages.

Appeal from a decision passed by the Hon'ble Justice J. B. Phear, one of the Judges of this Court, exercising the Original Civil Jurisdiction, dated the 13th August 1875.

A. A. Cohen and another (Plaintiffs), *Appellants*,

versus

Moonshee Mahomed Casseem Nana (Defendant), *Respondent*.

Mr. Jackson for Appellants.

Mr. C. C. Macrae for Respondent.

Where a breach of a contract to supply gunny bags had occurred from the failure of one of the contracting parties to receive three consecutive supplies of the bags on the stipulated dates, HELD that, even though the person contracting to supply the bags was not in actual possession of all the bags in respect of which he claimed damages, yet he was entitled to recover damages according to the established rule of awarding the difference between the contract rate and the rates prevailing in the market at the time of default.

Garth, C.J.—THERE is no doubt in this case as to the plaintiffs' right to recover, and the only question is as to the amount to which they are entitled.

The plaintiffs claim damages for the breach of a contract, by which they undertook to sell, and the defendant to buy, 360,000 Borneo gunny bags to be delivered by the plaintiffs during the year 1875 at the rate of 30,000 bags per month, 15,000 on the 15th, and the other 15,000 by the end of each month.

It is admitted that the defendant refused to accept the bags, which were to have been delivered on the 28th February and on the 15th and 31st March 1875; and it was found as a fact by the learned Judge in the Court below, and we entirely agree with him in so finding, that the plaintiffs were ready and willing to deliver the bags on these above dates.

It was proved on the part of the plaintiffs that these gunny bags were marketable articles in Calcutta; and Mr. Alexander Landale, who is a broker, stated that the greater portion of the gunny bag business

passed through his hands, and that, in the month of February 1875, the price of Borneo gunny bags was from Rs. 20 to Rs. 21 per hundred; at the middle of March Rs. 20; and at the end of March Rs. 19 per hundred. This witness does not appear to have been cross-examined, and no evidence was offered by the defendant to contradict or qualify his statement.

Here, then, we have a contract by which the plaintiffs agreed to supply the defendant with certain marketable goods at specified periods, and a breach of that contract by the defendant in not accepting the goods, which the plaintiffs were prepared to deliver, at three of those periods.

What, then, is the measure of damages to which the plaintiffs are entitled?

According to the ordinary and well established rule, they would, under such circumstances, be entitled to recover the difference between the contract price of the goods and the market price at the time of the breach (see the judgment of the Exr. Chamber in Barrow *vs.* Amand, 8 Q. B. 605). But the learned Judge in the Court below has considered that, in this particular case, the ordinary rule did not apply, and for this reason.

The plaintiffs, although prepared to deliver the goods in accordance with the contract, never had them in their actual possession, nor could they have procured them in the general market. Their only means of obtaining them was under a contract which they had entered into with the Barnagore Company upon the terms (amongst others) that they should pay for them in cash, which cash they looked to obtain on each delivery from the defendant.

Mr. David Gyld Landale, the Manager of the Company, stated in evidence that he was quite ready to supply the bags upon either receiving cash, or holding the shipping documents as security.

These circumstances appear to have led the learned Judge to the conclusion that, in this case, the ordinary rule for assessing the damages did not apply; and that the proper course was to endeavour to ascertain the extent of the plaintiffs' actual loss, having regard to the terms of his contract with the Barnagore Company.

He then proceeds to say in his judgment that he finds no materials in the evidence which would enable him to form an opinion of the plaintiffs' actual loss, and in the result he awards them Rs. 500, avowing, at the same time, that he arrives at that sum no particular principle or estimate.

We cannot think that this is a cor legal mode of assessing the amo damages, and we are unable to discov good reason why the terms of the pla contract with the Barnagore Company s affect the question of damages, or w ordinary rule of assessment should n adopted in this case.

It was undoubtedly quite right to in into the arrangement between the pla and the Barnagore Company, in order t certain whether the plaintiffs were read willing to deliver the bags on the days s fied; but that question having been de in the plaintiffs' favour, it is difficult t how the terms of that arrangement c possibly affect the question of damage between the parties to this suit.

As long as the plaintiffs were prepar deliver the goods, it appears to us imm rial how and when they obtained them, what price. Whether they cost the plai much or little, they were entitled to re from the defendant the contract p and, in the event of the defendant's n acceptance, they had a right to charge with the difference between that price the market price at the time of the bread

In contracts for the supply of large q tities of marketable goods, more espec when the goods are to be delivered from to time over a long period, it rarely hap that the seller has the goods in his a possession.

In contracts by a mine owner for supply of coals, or by manufacturers for supply of marketable manufactured artic or by timber merchants for the suppl timber for large undertakings, the sub of sale has generally to be worked, or m factured or obtained, as the contract provi and yet, in all such cases, the seller, in event of the buyer's non-acceptance at time mentioned in the contract, has a r to recover damages from him, ascert according to the ordinary rule.

If, in each of such cases, the Court w bound to inquire what it cost the mine ow to get the coals, or the manufacturer to m the articles, or the merchant to buy the timb the inquiry would not only be endless, but would be introducing a novel, and, as we co sider, an incorrect principle of ascertaini the extent of plaintiff's loss. In the ca of Cort *vs.* The Ambergate Railway Co 17 Q. B. 127, which appears to have bee somewhat relied upon in the Court below, i

found that the goods which were ject of sale were not marketable nor was it suggested in the course of gument that they were so. The then was for the supply of several d tons of Railway chairs, which, from ery nature, would not be bought and any general market, and consequently inary rule affecting marketable articles not apply to such a contract.

his we are of opinion that the ordi- rule does apply, and we, therefore, the plaintiffs the sum of Rs. 3,900 d in the plaint, which is a somewhat r sum than the evidence would t.

appeal is decreed with costs on scale .

The 4th May 1876.

Present:

e Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

er-claims—Set-off—Allowances—Cost of Cultivation—Collection Expenses.

Case No. 1176 of 1874.

al Appeal from a decision passed by Judge of East Burdwan, dated the April 1874, reversing a decision of Subordinate Judge of that District, ed the 31st December 1873.

k Chand Baboo (Plaintiff), *Appellant,*

versus

Sowdaminee Dassee (Defendant), Respondent.

aboos Unnoda Pershad Banerjee and *Taruck Nath Sen* for Appellant.

Baboos Chunder Madhub Ghose and *Ashootosh Dhur* for Respondent.

tion 195, Act VIII. of 1879, which enables a defend- obtain a decree against a plaintiff in respect of a er-claim, is only applicable where defendant has allowed to "set off" a demand against plaintiff's , and does not apply to a case where, in ascertain- defendant's liability for mesne-profits, deductions lowed from the rent proved to have been received nature of allowances made for costs of cultivation llection expenses.

Markby, J.—With regard to the first ection which has been taken, we think the mode in which the District Judge disposed of the issue of fact sent down he tried, is unimpeachable. We think he quite correctly carried out the order of Court and decided the question in accordance with the directions contained in the order which sent down the issue to be tried.

As regards the second question which has been taken, namely, that the defendant, Sowdaminee Dossee, had, by her written statement and the *furd* filed with it, admitted that Rs. 205 was due after deduction of the Government revenue, it appears that the District Judge, when this case was before him, did not take that view either of the written statement or of the account filed by the defendant. He found distinctly that Rs. 205 was the total amount which she had collected and for which she was liable as mesne-profits, and that, besides that, she had paid a considerable sum for Government revenue. In the ground of appeal which was filed in this Court, no objection was taken to the District Judge's judgment upon that ground; and we have no doubt that that course was taken, because it was then understood by all parties that that was the true construction of that document. Therefore we think that that ground cannot be taken now.

The other objection to the District Judge's judgment is this—that the defendant cannot have a decree for the difference between the sum which she is liable for as mesne-profits and the sum which she has paid for Government revenue, and we think that that objection is good.

The only provision in the law which would enable a defendant to obtain a decree in respect of a counter-claim against the plaintiff is section 195, Act VIII. of 1859. But that section only applies where the defendant has been allowed to *set off* a demand against the claim of the plaintiff. But, in our opinion, this is not a case of set-off at all. The defendant nowhere asked to be allowed to set off any demand, nor did she ever make any demand against the plaintiff. What was done in this case was that, in ascertaining the amount which she was liable to pay for mesne-profits, certain deductions claimed by her were allowed to be made from the amount of rent which she might be proved to have received just in the same way as an allowance is constantly made for costs of cultivation or collection expenses. And that being so, the provisions of section 195 would, in our opinion, have no application whatever.

The result is that, though the defendant may claim anything which she paid for Government revenue as an allowance in taking the account, she cannot claim the

benefit of section 195 so as to obtain a decree against the plaintiff.

The result is that there is nothing due from the defendant to the plaintiff, and, therefore, the decree of the lower Court, so far as it dismisses the plaintiff's suit with costs, will stand, but that part of the decree which directs a sum of Rs. 1,077 12 annas 8 gundas to be paid with interest and costs will be set aside, and the plaintiff's suit will stand simply dismissed with costs.

Inasmuch as each party has partly succeeded here, no costs will be given of this special appeal.

The 5th May 1876.

Present:

The Hon'ble E. G. Birch and G. G. Morris, *Judges.*

Ground of Remand.

Case No. 668 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 7th January 1875, affirming a decision of the Moonsiff of Eshurgunge, dated the 29th December 1873.

Brojo Nath Sen and another (Defendants), *Appellants,*

versus

Soorja Kant Sen (Plaintiff), *Respondent.*

Baboos Doorga Mohun Doss and *Aukhil Chunder Sen* for Appellants.

Baboo Nullit Chunder Sen for Respondent.

Where an Appellate Court has considered a case and come to the same conclusion as the Court of first instance, occasional obscurity in the judgment of the former does not constitute a proper ground for a remand.

Birch, J.—The judgment of the Lower Appellate Court is confused. The pleader of the special appellant contends that the finding of the Subordinate Judge is that the lands were held jointly, while the decree is for a moiety of a specific portion of land, and, therefore, he contends that the judgment is inconsistent with the decree.

I do not think that this contention is supported by the record. The Court of first instance found upon the admission of the defendant's pleader that the disputed land was measured as daghs 24 and 25 of the batwarra chittas and included in the plaintiff's "saham." It is further found that these daghs were held by the plaintiff and Ram Coomar and Hurro Coomar S belonging to the plaintiff and half to that in 1273 Ram and Hurro Coom up their moiety to defendant; th defendants then took possession of the of the 2 daghs, and dispossessed the pl and that the private partition alleged defendant was never made, but th property was duly divided by the Co and specific lands allotted to the holders. The Moonsiff accordingly the plaintiff a decree for possession land claimed in his plaint and for profits.

An appeal was preferred to the Su nate Judge, and the points to whic attention was called were, *1st*, wheth suit was barred by long adverse posse *2nd*, whether the land belonged to pl as his ancestral estate. It was never tended by the defendant that the land been held jointly; he alleged a private tion prior to 1261 which he failed to and he denied that the plaintiff had held any interest in the land in disput

The Subordinate Judge found that p iff had a $\frac{2}{16}$th interest in talook No. 5 that Ram and Hurro Coomar had $\frac{2}{16}$th defendant $\frac{12}{16}$ths; that daghs 24 an were held by plaintiffs and Ram Coom Hurro Coomar until 1273, when Ram Hurro Coomar transferred their sha those plots to defendants who includ with the market place which the Sub nate Judge says is the *sole* property of defendants. From that time, the Subordi Judge says, the plaintiff's title "was igno and, therefore, his suit is within time. goes on to say: "I do not think that defendants have good grounds for appeal He confirms the Moonsiff's decision and misses the appeal. The judgment disp of the points raised by the defendant, appellant before the lower Court.

It is urged here that we ought to rem the case, because a part of the judgme the Lower Appellate Court is obscure. is not, I think, an objection which we o to entertain in special appeal. To rem a case on such a ground would only incre litigation and put parties to needless expe So long as we see that an Appellate Co has considered a case and come to the sa conclusion as the Court of first instance, ought not to remand, because there may some portions of the judgment which obscurely worded. The decretal order clear, and both Courts have given to plain a decree for the land he claims.

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The special appeal is dismissed with costs.

Morris, J.—I think that there are undoubtedly expressions in the judgment of the Subordinate Judge which go to favour the view put forward by appellant that the Subordinate Judge only found as a fact upon the evidence that plaintiff had been in possession of, and was entitled to, a $\frac{2}{16}$th share of the land in suit, and that consequently his decree affirming that of the first Court which gave a moiety of the land in suit to the plaintiff is inconsistent with his finding of fact. As, however, it has been already observed, the judgment of the Lower Appellate Court is confused in its terms, and the conclusion at which it ultimately arrives is identical with that arrived at by the first Court. I observe also that the real question raised in the pleadings, and which is expressed in the 4th issue, was whether plaintiff had the interest and possession which he said he had in the land, or whether defendants had an exclusive right and possession in it. Now both Courts have undoubtedly found that the exclusive right and possession claimed by defendants have not been proved, and both have given a decree in favour of plaintiff. I am not disposed, therefore, to interfere, because the reasoning on which the Subordinate Judge bases his decree is open to an interpretation favouring a lesser right as existing in the plaintiff. I agree in dismissing the appeal with costs.

The 5th May 1876.

Present:

The Hon'ble E. G. Birch and G. G. Morris, *Judges.*

Thakbust Map—Subordinate Tenure—Shikmee Talook.

Case No. 864 of 1875.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 28th January 1875, reversing a decision of the Second Subordinate Judge of that District, dated the 13th April 1874.

Mohima Chunder Roy Chowdhry (Plaintiff), *Appellant,*

versus

J. P. Wise and others (Defendants), *Respondents.*

Baboos Mohinee Mohun Roy and *Bharut Chunder Dutt* for Appellant.

Baboos Hem Chunder Banerjee and *Huree Mohun Chuckerbutty* for Respondents.

A thakbust map is not intended to represent, and is, in no sense, a record of tenures subordinate to Government revenue-paying estates; and is of no value as evidence in a suit in which the extent of the interest of a shikmee talookdar is matter for determination.

Morris, J.—The plaintiff's allegation is that he inherited from his father, Shumbhoo Chunder Roy Chowdhry, a certain talook, by name Hari Prosad Doss, which had originally been carved out of a 10-16th share of Mouzah Tarapasha and Para Habiama, and the entire 16-16th share of Para Horiakandi appertaining to the zemindari No. 66, Pergunnah Joar Husenpore; that in the month of Bysack 1273, his father was put out of possession of the lands defined in the plaint, which constitute so much of the talook as had been carved out of Mouzah Tarapasha, and he brings this suit to obtain a declaration of his talookdari title in those lands and to be put in possession of the same. The first Court dismissed the suit, on the ground that plaintiff had failed to prove title or possession within twelve years next before the institution of the suit in the lands claimed.

The District Judge, however, on appeal, has found that there is no dispute between the parties as to the existence of the talook, Hari Prosad Doss, within Mouzah Tarapasha (and this, in fact, appears to be implied in para. 7 of defendant's written statement), that the lands in suit are proved upon good and sufficient testimony to have been up to the alleged date of ouster in the possession of plaintiff's father, but, inasmuch as plaintiff has only established his title in respect of a 2½-anna share of the lands of the entire village, which lands he holds jointly with the defendants, he, plaintiff, is entitled to a decree for a 2½-anna share only in the lands claimed, and he has given him a decree accordingly. The Judge determines this to be the share of the plaintiff solely upon the strength of a certain entry made in the thakbust map of Mouzah Tarapasha bearing date 1854 under the head of "Proprietors." This entry notes the existence of a shikmee talook in the possession of plaintiff's father's vendor to the extent of a 10-anna share, so the Judge construes it, within the 4-anna share of one of the proprietors, *viz.*, defendant No. 1.

Against this construction and this determination of share by the Judge, the present special appeal is preferred by plaintiff.

It is clear that the entry in the thakbust map can be no proof of plaintiff's title in the shikmee talook, Hari Prosad Doss, or of the extent of his share in the lands of Mouzah Tarapasha. The thakbust map was never intended to represent, and is, in no sense, a

record of tenures subordinate to Government rent-paying estates. The column under which this entry is found is a column intended to show the names of the Government rent-paying proprietors in actual possession of the village. It was quite outside the duty of the Thakbust Ameen or Peshkar, who drew up the contents of this column, to notify the existence or extent of share of the proprietor of any subordinate tenure. Such note can have no value as evidence in a suit in which the extent of interest of the shikmee talook-holder is matter for determination. This entry in the thakbust map must, therefore, be discarded from consideration, and the case must go back to the Judge for re-trial. The parties being in accord as to the existence of talook Hari Prosad Doss within Mouzah Tarapasha, the case resolves itself into the simple question whether the plaintiff has proved by the evidence which he has adduced that the lands in suit were in his father's possession prior to and up to Bysack 1273, and that he was ousted from them by the defendants as alleged in the plaint.

The order passed by the Judge is set aside, and costs will abide the result.

The 8th May 1876.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Instalment-bond—Limitation—" Money sued for."

Case No. 1910 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of East Burdwan, dated the 12th June 1875, reversing a decision of the Sudder Moonsiff of that District, dated the 15th March 1875.

Juggut Mohinee Dossee (Plaintiff), *Appellant,*

versus

Monohur Koonwar and another (Defendants), *Respondents.*

Baboo Sham Lall Mitter for Appellant.

Baboo Gopeenath Mookerjee for Respondents.

Where a certain amount of money was recoverable under an instalment-bond by the sale of the property hypothecated in it, and it was one of the stipulation bond that the whole amount might be rec execution of decree, on default of payment at any one of the stipulated periods for the pa an instalment, HELD that, as a separate suit be brought for the whole amount on the occasion default which occurred before the termination last kist, the whole amount could not, for the of the law of limitation, be held to be due occasion of any such default.

THIS was a suit to recover a amount of money due under an instal bond by the sale of immoveable prop hypothecated in it. It appears tha plaintiff had executed a decree for which she had obtained against the de ants. In the course of the executi that decree, the first kistbundee was fi Court by the vakeel for the defendants the pleader for the plaintiff accepted behalf of his client. It was agreed i bond that the money due under the d was payable in several instalments, was further stipulated that, on default o one of the instalments, the whole amount under the bond should be recoverabl execution of decree. From certain end ments on the back of the bond it app that default was made in the payment o very first instalment. This default place more than twelve years before institution of the suit.

The Moonsiff decreed the claim, and appeal the Subordinate Judge, holding the cause of action arose on the date of first default, *i.e.*, more than twelve y before the institution of the suit, and the bond was not established by evide dismissed the suit.

In special appeal it has been urged upon the facts admitted and found the pla iff's suit is not barred by limitation. It been also contended that the Subordi Judge was in error in supposing that the no evidence on the record to establish authenticity of the bond. There is evide on the record to establish its genuinen and the Subordinate Judge has not co sidered it.

The first question that I have to consid is, whether or not the plaintiff's suit is barre by limitation. The instalments for whic the present suit has been brought are withi twelve years from the date of the suit. I think it is clear that Article 132 of the second schedule of the new Limitation Act

must govern the decision of this question. According to this schedule, the suit must be brought within twelve years from the date when the "money sued for" became due. What I have therefore to determine is, on what date the money sued for in this case became due. According to the general provisions of the bond, "the money sued for" became due on the several dates on which the instalments confirming it were payable. There is no question that these dates are within twelve years from the commencement of the suit. But the Subordinate Judge held, under the especial stipulation of the bond referred to above, that the whole amount due under it became payable when the first default was made. This I do not think is the correct view of the stipulation in question. It provides that if default be made in the payment of any one instalment, the whole amount remaining due under the bond would be at once recoverable by *execution of the decree*. I think it is neither just and equitable in this case, nor is there anything from which it can be rightly inferred, that it was the intention of the parties that the plain words of the contract should be amplified and construed to mean that, upon the happening of the contingency stated above, the whole amount of the kistbundee should not only be recoverable by execution of decree as the stipulation in question expressly provides, but also by a separate suit, for which as far as the words go, there is no provision in the bond. I am of opinion therefore that the "money sued for" did not become due when default was made in the payment of the first instalment.

Upon the question of limitation, the Moonsiff held that by the provision of Article 75 of the Schedule referred to above, the suit was not barred. I agree with the Subordinate Judge that Article 75 has no application in this case. While I am of that opinion, I am by no means sure that if it were necessary, I should not have adopted the principle indicated in the third column of Article No. 75 in determining the question as to when "the money sued for" became due. But it is not necessary for me to express any decisive opinion upon this question, because, according to the construction which I think ought to be put upon the bond in this suit, "the money sued for" did not become due upon the default in the payment of the first kistbundee in the sense that it could be recovered by a separate suit. I am of opinion, therefore, that the plaintiff's suit is not barred by limitation.

As regards the other question, it also appears to me that the Subordinate Judge is in error in supposing that the plaintiff has adduced no evidence in support of the bond. It has been proved, if the witnesses are to be believed, that the whole of this bond is in the handwriting of a person who was engaged as a vakeel for the defendants in the execution-case. It was produced in the Court in which the execution-proceedings were pending, and it bears on the back of it an order signed by the judicial officer presiding in that Court. This order recites that it was filed by the debtor's vakeel, and consented to by the pleader for the creditor. This evidence, I think, is quite conclusive of the fact that this bond was filed by the vakeel of the defendants, and it purported to have been executed by them. Then we have the evidence of a witness, who was present in Court then, and who acted as a mookhtear on behalf of the plaintiff in that execution-case. This witness proves that a bond written by the vakeel of the defendants mentioned above, and signed and approved by them in his presence, was filed in the Court of execution by the aforesaid vakeel. If the testimony of the witnesses examined by the plaintiff be believed, can there be any reasonable doubt that the bond referred to by the witness whom I have last noticed is the bond upon which the present suit has been brought? I think therefore there is ample evidence on the record to establish the bond, but the Subordinate Judge has pronounced no opinion upon the credibility of these witnesses. I cannot therefore in special appeal dispose of this case finally. The appeal is, therefore, remanded to the Subordinate Judge to determine whether the evidence adduced by the plaintiff in support of the bond is reliable or not. In determining this question, the Subordinate Judge should not lose sight of the circumstances which are alleged to have preceded the execution of the bond, *viz.*, that in execution of a decree obtained by the plaintiff against the defendants, a sale of the properties belonging to the latter was impending for the purpose of realizing the very amount for which the kistbundee was subsequently given. Costs to abide the result.

The 8th May 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Cause of Action—Discharge of Debt to Manager—Presence of Vakil a Notice.

Case No. 2899 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 3rd August 1874, reversing a decision of the Moonsiff of Nassirnuggur, dated the 14th December 1872.

Rukhyakur Bhuttacharjee, father and guardian of Shurno Moyee Dabee, minor (one of the Defendants), *Appellant,*

versus

Kuroona Moyee Dabee (Plaintiff) and another (Defendant), *Respondents.*

Baboo Bykunt Nath Doss for Appellant.

Baboo Aukhil Chunder Sen for Respondents.

Where a debt was owing to a minor plaintiff's father, and had been paid off in instalments to the manager of the estate who, on the renewal of the bond, had had it renewed in his own name, and had misappropriated the money, HELD that the minor plaintiff had no cause of action against the debtor. Where, however, the Subordinate Judge had given a decree for the amount against the estate of the manager mentioning in the decree that his vakil was present in the Court, and his heir sought to set aside the decree on the ground that it had been made behind his back, HELD that the presence of the vakil was equivalent to a substantial notice.

Macpherson, J.—THERE is no doubt that the Lower Appellate Court was right in holding that, under the circumstances, the plaintiff was not entitled to any relief as against the defendant, Anundo Chunder Nundi, because the plaint shows no cause of action against Anundo Chunder Nundi. The case made in the plaint is that Anundo Chunder being indebted to the minor p iff's father, and the father having and Jibun Krishna being the manag behalf of the minor, the document by the debt was secured was renewed time to time in the name of Jibun Kr till finally in Assin 1277 Anundo Ch paid off the whole amount with in to Jibun Krishna. The plaint goes state that Jibun Krishna did not pa money over to the minor's use but misa priated it.

On these facts no action can lie ag Anundo Chunder. And so far the Su dinate Judge was right.

But the Subordinate Judge, on the of August 1874, while dismissing the against Anundo Chunder, found as a that Anundo Chunder had paid the to Jibun Krishna as alleged by the pl iff; and the Subordinate Judge there gave a decree against the estate of Ji Krishna for the amount so paid to him interest and costs.

The principal objection urged on be of the heir of Jibun Krishna is that order of the Subordinate Judge was m behind his back, and without any n having been given to him of a review judgment having been applied for and gra by the Subordinate Judge. It is true that record, so far as it is before us, does not sh that notice was issued to Rukhyakur Bhu charjee, the father and guardian of minor widow and heiress of Jibun Krish But it does not follow that, although formal notice was served, substantial no may not have been given through vakil who was acting in the suit this party. As a matter of fact the dec of the 3rd August 1874, now appea against, distinctly states that it was m in the presence of the vakils of the parti the vakil of the minor appellant bei mentioned by name. That statement the decree is just as binding as anythi else in the decree. If that statement not correct, the present appellant shou have applied to the Subordinate Judg and asked him to strike out the name the vakil improperly represented as havi been present. As it is, the decree sta that he was present; and there is nothi to show us that he was not. We m accept the decree as containing a corre statement of the facts in the absence of som very strong evidence to the contrary. Th appeal must therefore be dismissed.

We make no order as to costs.

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The 9th May 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Ejectment—Lapse of Right—Sale over a Gift.

Case No. 444 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 14th December 1874, reversing a decision of the Moonsiff of Fenchoogunge, dated the 18th August 1874.

Soojat Mahomed and another (two of the Defendants), *Appellants,*

versus

Mahomed Torab (Plaintiff), *Respondent.*

Baboo Joy Govind Shome for Appellants.

Baboo Rajendro Nath Bose for Respondent.

Where a husband was alleged to have given a share in some property to his wife, and the husband subsequently sold the whole property to another party, and put the said party in possession without any objection from the wife, who for years behaved as though she had no interest in the property other than that arising from her husband's possession of it in his own right, HELD that a person afterwards claiming to have purchased the wife's share, and seeking to be put in possession, could not displace the *bonâ-fide* purchaser from the husband; for a person in the position of the wife in this case, who chooses to stand by for years not asserting her rights, but allowing another to deal with her property as his own, has no equity to come into Court and eject any one who has purchased in ignorance of her title.

Macpherson, J.—THE legal position of the parties is as follows: In 1262 or 1263 (that is, about the year 1856) the husband, Chamai, is said to have given the share now in dispute to his wife, Auron, under an instrument in the nature of a kabinnama.

It is found by the Subordinate Judge that the wife, Auron, never, under that gift, had any possession save such as she had by reason of her husband, Chamai, having always continued in possession. Many years later, Chamai appears to have sold the property, and he having refused to register the bill of sale, legal proceedings were taken against him and Mussamat Auron. These resulted in a solehnama being entered into on the 14th of March 1866, and as Mussamat Auron was a party to this solehnama, Chamai would seem, by his participation in it, to have recognized a right in his wife jointly with himself to the property.

The present defendants were not parties to, and were in no way bound by, that solehnama, or the proceedings in which it was filed.

In Aughran 1276 (about 1869), the husband, Chamai, sold the property to the defendant, executing the kobala under which they now claim; and the defendants thereupon were put into possession, and have remained in possession ever since.

On the 1st Falgoon 1279 (1871), the wife, Auron, sold her share to the plaintiff (her own brother) by a bill of sale, under which he now claims. The plaintiff admitting that Auron, his vendor, was out of possession, now sues to recover possession from the defendants, alleging them to have been in possession since their purchase in 1276.

Assuming all these facts to be well proved, as the Subordinate Judge finds that they are, it appears to us that the plaintiff has no right to displace the defendants from the possession which they have.

The wife never asserted her rights, nor had any possession at all of this property, and the only thing, down to the plaintiff's purchase in 1279, indicative of the wife's being interested in this property, was the introduction of her name, without any objection on the part of her husband, in the solehnama filed on the 14th of March 1866.

Even this solehnama (of which there is no evidence that the defendants had notice) was followed by no change in the mode of dealing with the property; and the husband appears to have remained in possession exactly as he had been previously. Nor is there anything to show that when, three years later, he again sold the property to the defendants and put them in possession, any objection was made to the act of her husband or to his giving possession to the defendants.

The defendants having been in possession from Aughran 1276, the plaintiff in 1279 purchases from the wife, Auron, whom he knew not to be in possession. It really comes to this: that the wife, Auron, never having asserted any right under the kabinnama, and having allowed the husband to remain the apparent owner throughout, even after she found him dealing with and attempting to sell the land, never took any steps to assert her rights, or put herself forward as the proprietor. The husband in 1276 put the defendants in possession as purchasers, and the wife took no steps to prevent him.

It seems to us that such conduct on the part of the wife, Auron, debars her, and any one claiming under her, from coming

forward and upsetting the title which the defendants have under the deed of 1266, and the possession which they have had ever since. If a person in the position of Auron, the wife, chooses to stand by for years, not asserting her rights, but allowing another to deal with the property as his own, she has no equity to come into Court and eject those who have purchased *bonâ fide* in ignorance of her ever having had any title.

The decree of the Lower Appellate Court is set aside, and that of the Moonsiff is restored.

The appellant will have his costs both in this Court and in the Courts below.

The 9th May 1876.

Present :

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Limitation—Title acquired in Twelve Years—Endowment.

Case No. 51 of 1875.

Regular Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 30th December 1874.

Mohunt Nursingh Dass (one of the Defendants), *Appellant*,

versus

Moosharoo Bhandaree (Plaintiff), *Respondent*.

Mr. C. Gregory for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

Where a plaintiff was crossed in an attempt to recover rent by an intervenor who claimed the land, and was thus forced to prove his title to the land, and brought a suit to do so, wherein he both filed the deeds by which he acquired the property, and gave evidence of undisturbed possession for more than twelve years: HELD that, though his deeds were evidently genuine and valid, it was unnecessary to weigh them, seeing that the intervenor's claim was barred by the law of limitation.

The land in suit in this case was alleged to have formed an endowment; and it was HELD that the plaintiff by his twelve years' occupation had acquired a title, even though his vendor had not had power to aliene the property.

Garth, C.J.—THIS is a claim for adjudication of right and confirmation of possession in respect of 30 beeghas of land in Mouzah Behut. The suit originated in this way: The plaintiff, in the year 1871, took proceedings against two persons whom he alleged to be his tenants of a the land in question, and he obtained against them accordingly. In exec the decrees, he caused their lands attached, whereupon the defendant vened and claimed the land as his p and his objection was allowed by the siff. Consequently the plaintiff ha driven to bring this suit to establi title, not only to the particular la which these persons were alleged tenants, but to the whole of the which the defendant claimed, of those lands formed a part.

The plaintiff founds his case up deeds—one of which, dated in the 1846, was a deed by which Mohunt Dass conveyed 32 beeghas of jahirian to two persons, Kalika Dutt and Mo Dutt, who then, under the second on which the plaintiff relies, and whic dated in the year 1862, sold 30 beegh of the 32 (being the 30 beeghas clai this suit) to the present plaintiff; a plaintiff has given evidence in this c possession and receipt of rent under deeds for nearly thirty years.

The defendant, on the other hand called several witnesses to prove th has been in possession and receipt of of these lands for several years past; he contends, in the first place, that the set up by the plaintiff are not gen and, in the next place, that, even if were, Mohunt Ram Dass had no pow aliene the property, as it was endowed and he was merely the mohunt of it.

In answer to this it was contended however incompetent the mohunt have been to aliene this property, if plaintiff and his predecessors in have been in possession of it for up of twelve years, they have acquired a to it under section 29 of the Limit Act, which says that after twelve y adverse possession, not only shall the re be barred, but that the party in posses shall acquire a title.

The Judge in the Court below decided both the question of right and possession in the plaintiff's favour; and his decision depended in a great meas upon evidence of facts of which, probab he was a much better judge than we a I for one should not be disposed to over his judgment unless good grounds w shown us for doing so. But, having hea Mr. Gregory on behalf of the appellant who has called our attention to the evidence

sides, so far from seeing any reason g dissatisfied with the conclusion h the Judge has arrived, I quite not only with that conclusion, but h the reasons upon which he founds

defendant's evidence to begin with ainly very meagre, and his witnesses estimony so nearly in the same ge that it looks as though they had schooled as to what to say. More- cannot help attributing considerable to the fact that the defendant him- not called as a witness on his own I am quite aware of the preju- that exists in this country (I have ntly had occasion to advert to it) t parties going into the witness-box ve their own case. To my mind oner this prejudice is done away with, etter it will be for the Courts of ; and, as long as I sit here, I shall attach great weight to the fact that who knows the circumstances of his horoughly, and who could give the evidence of it, abstains from coming d as a witness; and the more so, se my experience, short as it is, has me that, in cases where a man has a ous cause, he does frequently present lf in the witness-box, but, where he bad or untruthful case, he abstains doing so, and then makes this alleged lice an excuse for not being examined. this case the defendant, if he had n possession and receipt of the rents se years, was the best person to come d to prove it. His position would given weight to his evidence. There good reason suggested for his absence; confess my own impression is, that al reason was because he knew his was a bad one. He prefers, therefore, forward these four or five witnesses he has called, and who, if we believe se of the plaintiff, must be telling a story.

w, on the other hand, the plaintiff has nly gone into his evidence of posses- in greater detail, but his witnesses r to be more trustworthy; and I must hat, with regard to those deeds which aintiff has set up, the evidence appears to be perfectly convincing; and I I cannot do better than read that n of Mr. Geddes's judgment (with I entirely agree) which deals with ubject. He says: "The plaintiff and vendor have produced attested copies "procured from the Registration Office of "the deeds of sale on which they claim as "against the late mohunt as vendor, and as "against the present mohunt as bound by "his predecessor's action. The earlier deed "of sale, that from the former mohunt to "the plaintiff's vendor, defendant No. 2, "has been placed before the Court in the "shape of an attested copy granted by the "then Registrar, Dr. Simpson, who records "having registered it on the 28th January "1846. The absence of the original itself "has been accounted for to my satisfaction. "It is not suggested for a moment that such "a document was not registered, nor copied "by the Registrar in 1846, and that, if "genuine, it bears out the title of plaintiff's "vendor. In the same way, the deed of "sale (but in this instance the original, and "not a copy) from plaintiff's vendor to "plaintiff has been produced, and incontes- "tably has been attested by Dr. Macnamara, "the then Registrar, on the 26th December "1861.

"The theory put forward by the defend- "ants is, that the plaintiff and the plaintiff's "vendor have been, all along from 1846 till "1873, getting up a conspiracy against the "muth of which defendant No. 1 is the "present mohunt; and that the registration in "1846 and 1861 are merely two of many "cunning steps to back up a false claim. This "theory of a conspiracy hatched over twenty "years seems difficult to believe, but it "quite falls to the ground on examining the "actual evidence put forward for the plaint- "iff."

It appears to me that the evidence given by the plaintiff of possession and receipt of rent is perfectly consistent with these deeds under which he claims title; and that, therefore, by virtue of the law of limitation (for into the question of the validity of these deeds as instruments of actual conveyance, it is unnecessary, in this view, to enter), I consider that the plaintiff has made out a perfect title and right to possession. This appeal, therefore, is dismissed with costs.

It is admitted by the vakils of both parties that the appeals numbered 52, 53, 54, 55, 56, and 113 will be governed by the principle of this decision. Those appeals, therefore, are also dismissed with costs.

Ainslie, J.—In this case I think that, even if we were to take the evidence on each side as *primâ facie* equally valid, which certainly it is not (I entirely agree with the remarks made by the Chief Justice as to the evidence adduced on behalf of the

status of the family continued at the time of his death to be that of a joint and undivided Hindoo family, his interest in the joint family-property survived to his male co-parceners. The only persons who answered that description were Sudaburt Pershad, and the plaintiff Hurreenath Pershad. They, in some of the proceedings, are called his nephews, but, according to the pedigree set out in the appellant's case, and apparently proved in the cause, they were his first-cousins, the sons of two different uncles.

It must now be taken to have been conclusively determined that Bhugwan at the time of his death, though entitled to certain subsequent acquisitions as separate estate, was, as to all the properties acquired by the family in the name of any of its members before the year 1846, joint in estate with Sudaburt and Hurreenath, and accordingly that his share in those properties became vested by survivorship in them. This question was first litigated in a suit brought by Sudaburt in 1861. The principal defendants to that suit were the widows. The judgment of the Zillah Judge confirmed on appeal by the High Court on the 10th of March 1863 made the distinction above stated between the properties acquired before, and those acquired subsequently to, 1846, affirming the title of the surviving male members of the joint family to the former. It unfortunately, however, happened that, owing either to the frame of this suit or to the manner in which the decree made in it was executed, the result of this earlier litigation was only to put Sudaburt into possession of one moiety of Bhugwan's share in the joint family-property.

Subsequently the remaining half-share of Bhugwan in portions of the joint family-property appears to have been seized and sold in execution of various decrees obtained against his widows as his representatives. And on the 10th of April 1865, the present suit was instituted by the mother and guardian of Hurreenath in order to recover possession, and to have his name entered as proprietor of his moiety of Bhugwan's share in the joint properties, and to cancel and set aside the execution-sales under the decrees against the widows. The defendants to that suit were the widows, the different purchasers under the execution-sales, and, under the description of "Precautionary Defendants," the widow of another deceased member of the joint family, as to whom there is now no question, and Sudaburt Pershad, the plaintiff in the former suit. As such defendant Sudaburt filed the ment at page 18 of the record disclaimed all interest in the ground that, under the decree in he had been put in possession in the property in dispute. Th tried between the plaintiff and defendants, and a decree was m Principal Sudder Ameen on the 1866; which, in so far as it rela particular properties which are th of the present appeal, was in fav plaintiff. Against this decree t defendants, who were affected by to the High Court. Their ap necessarily separate, inasmuch was so framed as to embrace i only dependent on different titles, ed to particular portions of the pr dispute. The High Court decided these appeals in favour of the de upon grounds of which some will wards considered. This appeal Majesty in Council originally embra eleven of the separate decrees so And of these Mr. Cowie has given *viz.*, No. 237. Accordingly their L have now only to deal with the q involved in the ten appeals, numbe spectively 178, 224, 235, 239, 244, 23 238, 240, and 245.

The course of proceeding in the Court with respect to these appeals follows: The Division Bench before they came, conceiving that they in points of law on which the authoritie conflicting, referred the following qu to the consideration of the Full Bench

1. Bhugwan Lall, a member of a H family, living under the Mitakshara La having joint family-property, died enti an undivided share in such propert leaving two widows him surviving. the death of Bhugwan Lall, his widow sued in their representative capacity spect of debts incurred by him in *his li* on his own account, and not for the b of the joint family, and decrees were ob against the widows in that capacity. execution of one or more of these dec an interest in certain portions *of the* family-property, to the extent of the s to which Bhugwan Lall was entitled i lifetime, has been sold by auction, and purchasers have taken possession. Can nephew of Bhugwan Lall, who is *one of* surviving members of the joint fa recover from the purchasers possession o

On that same evidence (unless for some very exceptional reason) it is the duty of the Lower Appellate Court to decide on appeal whether the Moonsiff's finding is right or not.

If it was necessary to inquire further as to the kubooleut of 1265, the Subordinate Judge ought to have retained the appeal on his own file and to have proceeded under section 354 of the Civil Procedure Code. He ought (as directed by that section) to have framed an issue, and referred it for trial to the Moonsiff. Thereupon it would become the duty of the Moonsiff to try that issue, and return to the Appellate Court his finding thereon, together with the evidence. That finding and evidence would become part of the record in the suit before the Lower Appellate Court, and either party might (within a time to be fixed by the Subordinate Court) file a memorandum of any objection to the finding of the Moonsiff; after which the Lower Appellate Court would proceed to determine the appeal. There is no conceivable reason why this case should have been sent back to the Moonsiff for trial *generally*.

It was the business of the Subordinate Judge to try the case himself, and to decide upon such questions of law as arose out of the facts finally found by him to be proved.

The order of remand is, therefore, set aside; the appeal will go back to (and will be restored to its old number, &c., on) the file of the Subordinate Judge, who is directed to dispose of the appeal finally himself. If he deems it essential, he can, under section 354, refer an issue to the Court of first instance for trial as to whether the kubooleut of 28th Cheyt 1265 is or is not a genuine document. We have already called attention to the manner in which any such issue, if referred, is to be dealt with.

The Subordinate Judge must take this case up at once out of its turn. If he frames an issue and refers it to the Moonsiff for trial, he will direct the Moonsiff to dispose of it without any delay, and to return the evidence taken by him, together with his finding thereon, to the Lower Appellate Court within one month of his receiving the Subordinate Judge's order referring the issue for trial. And the Subordinate Judge, as soon as the case comes back to him from the Moonsiff, will forthwith dispose finally of the whole case.

The costs of this appeal will follow the result of the suit.

The 1st February 1876.

Present:

Sir James W. Colvile, Sir Montague E. Smith, and Sir John B. Byles.

Recovery of Possession — Undivided Hindoo Family—Setting aside Sale — Prior Lien—Limitation.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Mussamut Phoolbas Koonwur and another

versus

Lalla Jogeshur Sahoy and others.

Where a member of a Hindoo family, living under Mitakshara Law, and having joint family-property, died entitled to an undivided share, leaving two widows, who were afterwards sued for debts incurred for his own benefit by their husband, and against whom decrees were obtained by the creditors, and one of the surviving members of the joint family sought to recover possession of the interests which had been sold in execution of the decree against the widows, HELD that, so far as the interests in suit were not covered by any prior lien, the surviving member was entitled to recover them from the auction-purchaser.

Where, however, some of the interests in question were covered by a zúr-i-peshgee mortgage, and the exact nature of the lien thus created had not been fully explained in the trial, HELD that the surviving member could not recover his interests until he had satisfied this lien.

And where, in the same suit, the objection was taken that the claim would not stand because of a defect in the frame of the suit whereby a co-sharer in the joint family-property was not made a party to the suit, HELD that, as the said co-sharer had previously been put in possession of his moiety of the property, and had put in a waiver of all further claims, and no further claimant could possibly arise, the plaintiff's suit was not prejudiced by the defect:

HELD, also, that a guardian, in a suit like this one, is not debarred from bringing a suit on behalf of a minor claimant, whilst the disability of infancy continues, because it is not the policy of the law to postpone the trial of claims.

THE suit out of which this appeal has arisen concerns a moiety of the undivided share of one Bhugwan Lall Sahoo in certain immoveable property, situate in Zillah Sarun. Bhugwan Lall Sahoo, who died in 1860, was the member of a Hindoo family which was descended from a common ancestor named Deepa Sahoo, and was governed by the law of the Mitakshara, the general law of the province in which it was domiciled. He died childless, but left two widows, Moheshee and Parbuttee. They, therefore, would have been his general heirs had he been wholly separate in estate; and were in any case entitled to such part of his succession as had been acquired, or was held by him as separate estate. On the other hand, if the

* From the judgment of Kemp and Markby, JJ., decided on the 18th November 1870.

status of the family continued at the time of his death to be that of a joint and undivided Hindoo family, his interest in the joint family-property survived to his male co-parceners. The only persons who answered that description were Sudaburt Pershad, and the plaintiff Hurreenath Pershad. They, in some of the proceedings, are called his nephews, but, according to the pedigree set out in the appellant's case, and apparently proved in the cause, they were his first-cousins, the sons of two different uncles.

It must now be taken to have been conclusively determined that Bhugwan at the time of his death, though entitled to certain subsequent acquisitions as separate estate, was, as to all the properties acquired by the family in the name of any of its members before the year 1846, joint in estate with Sudaburt and Hurreenath, and accordingly that his share in those properties became vested by survivorship in them. This question was first litigated in a suit brought by Sudaburt in 1861. The principal defendants to that suit were the widows. The judgment of the Zillah Judge confirmed on appeal by the High Court on the 10th of March 1863 made the distinction above stated between the properties acquired before, and those acquired subsequently to, 1846, affirming the title of the surviving male members of the joint family to the former. It unfortunately, however, happened that, owing either to the frame of this suit or to the manner in which the decree made in it was executed, the result of this earlier litigation was only to put Sudaburt into possession of one moiety of Bhugwan's share in the joint family-property.

Subsequently the remaining half-share of Bhugwan in portions of the joint family-property appears to have been seized and sold in execution of various decrees obtained against his widows as his representatives. And on the 10th of April 1865, the present suit was instituted by the mother and guardian of Hurreenath in order to recover possession, and to have his name entered as proprietor of his moiety of Bhugwan's share in the joint properties, and to cancel and set aside the execution-sales under the decrees against the widows. The defendants to that suit were the widows, the different purchasers under the execution-sales, and, under the description of "Precautionary Defendants," the widow of another deceased member of the joint family, as to whom there is now no question, and Sudaburt Pershad, the plaintiff in the former suit. As such defendant Sudaburt filed the w ment at page 18 of the record disclaimed all interest in the s ground that, under the decree in h he had been put in possession of in the property in dispute. The tried between the plaintiff and defendants, and a decree was ma Principal Sudder Ameen on the 9th 1866, which, in so far as it relat particular properties which are the of the present appeal, was in favo plaintiff. Against this decree th defendants, who were affected by to the High Court. Their ap necessarily separate, inasmuch as was so framed as to embrace inter only dependent on different titles, but ed to particular portions of the prope dispute. The High Court decided m these appeals in favour of the defen upon grounds of which some will be wards considered. This appeal to Majesty in Council originally embrace eleven of the separate decrees so And of these Mr. Cowie has given u *viz.*, No. 237. Accordingly their Lor have now only to deal with the que involved in the ten appeals, number spectively 178, 224, 235, 239, 244, 234 238, 240, and 245.

The course of proceeding in the Court with respect to these appeals w follows: The Division Bench before they came, conceiving that they in points of law on which the authorities conflicting, referred the following que to the consideration of the Full Bench:

1. Bhugwan Lall, a member of a H family, living under the Mitakshara Law having joint family-property, died entit an undivided share in such property leaving two widows him surviving. the death of Bhugwan Lall, his widows sued in their representative capacity i spect of debts incurred by him in his lif on his own account, and not for the b of the joint family, and decrees were obt against the widows in that capacity. execution of one or more of these dec an interest in certain portions of the family-property, to the extent of the s to which Bhugwan Lall was entitled in lifetime, has been sold by auction, and purchasers have taken possession. Can nephew of Bhugwan Lall, who is one of surviving members of the joint fam recover from the purchasers possession of

terests which they have purchased, or any part of them?

2. Bhugwan Lall, in his lifetime, executed a ordinary zur-i-peshgee mortgage in respect of his undivided share in a portion of the joint family-property in order to raise money on his own account, and not for the benefit of the family. Can the nephew of Bhugwan Lall recover from the mortgagee, without redeeming the same, possession of the mortgaged share or any portion of it?

The first of these questions the Full Bench unanimously answered in the affirmative. The result of their opinions is thus expressed by the Chief Justice, Sir Barnes Peacock, at the close of his judgment: "I think, therefore, that this property, not being the property of the widows, and not being the property of the heirs of the deceased, could not be made available under the decree against the widows; that, if it could be made available at all for payment of the debts of the deceased, it must be in a suit against the survivors to charge the share of the deceased in the joint estate with the payment of the decree by suing the survivors for the debt, and asking to have the deceased's share of the estate made available in the hands of the survivors to the same extent as that to which it would have been made available if the deceased had left a son, and the estate had gone to him by inheritance, instead of to the survivors by survivorship. I think, then, that the question must be answered in the affirmative; that plaintiff has a right to sue the purchaser under the decree to recover back the estate, inasmuch as the property belongs to him, and the title of the purchaser under the decree against the widows is an invalid title."

Upon the second and more difficult question the Chief Justice, after reviewing the authorities, came to the conclusion that, according to the law of the Mitakshara as settled by authority in the Presidency of Bengal, Bhugwan Lall had no authority, without the consent of his co-sharers, to mortgage his undivided share in the joint family-property in order to raise money on his own account, and not for the benefit of the family. He further observed that the facts were not sufficiently stated to enable the Full Bench to say whether the nephew, Bhugwan Lall, could recover from the mortgagees, without redeeming the same, possession of the mortgaged share or any portion of it. The other members of the Full Bench also concurred in this opinion.

The appeals, the parties not consenting to have them decided by the Full Bench, necessarily went back to the Division Bench, and were thus dealt with. Mr. Justice Markby, after going through the facts in each case, held that Nos. 170, 224, 235, 239, and 244 were wholly governed by the answer of the Full Bench to the first question, inasmuch as in each the title of the appellant, defendant, depended entirely on the validity of his purchase at a sale had in execution of a decree against the widows, and was consequently defective.

In No. 243 it was alleged by the appellant that the property claimed, Mouzah Telpakhoord, was subject to a zur-i-peshgee lease executed by Mukhun Sahoo, a member of the joint family, who predeceased Bhugwan Lall. Mr. Justice Markby, however (Record, p. 466), seems to have found that the title of the appellant did not depend on this alleged zur-i-peshgee from which he had been ousted, but on a purchase at a sale in execution of the decree which he had obtained against the widows; and consequently that this case was not distinguishable from No. 170.

In No. 234, however, the property in question was clearly subject to a subsisting zur-i-peshgee lease, created by Bhugwan Lall; and in this case, therefore, there necessarily arose the further question, whether the plaintiff could recover this parcel of land without redeeming the mortgage on it. And the learned Judge, accepting, apparently against his own judgment, the principle affirmed by the answer of the Full Bench to the second question, held that it would entitle him to do so. There remained three other cases, *viz.*, Nos. 238, 240, and 245, which would have fallen into the first of the before-mentioned classes if the learned Judge had not held, for reasons which will be presently considered, that the plaintiffs' claim in respect of them was barred by the one year's rule of limitation prescribed by the 246th section of Act VIII. of 1859. If, then, the case had rested there, the result would have been a decree in favour of the plaintiff on all the appeals now in question, except the three last. Mr. Justice Markby, however, proceeded to lay down a principle which governed all the cases, and, as it seemed to him, justified in each the dismissal as against the appellant of the plaintiffs' suit. That principle will be afterwards more fully stated and considered.

Mr. Justice Kemp, the other Judge of the Division Bench, concurred with Mr. Justice Markby on this last point, but expressed no

opinion on the question of limitation which was raised in appeals Nos. 238, 240, and 245. A decree was accordingly made in favour of the parties appellant in each of the ten appeals. And this consolidated appeal is against those decrees.

Their Lordships propose in the first instance to consider whether the appeals Nos. 238, 240, and 245 have been rightly disposed of on the ground of limitation. The facts proved are that, in each of these cases, the plaintiff, through his guardian, preferred a claim to the property, when attached under the 246th section of Act VIII. of 1859; that that claim was rejected; and that the present suit was not brought within one year from the date of the order of rejection. This objection would have been fatal to the suit had the party preferring the claim been an adult; and the only question to be determined was whether the plaintiff, being under the disability of infancy, could claim the benefit of the 11th section of Act XIV. of 1859, which empowers him or his representative to bring a regular suit within the same time after the cesser of the disability as would otherwise have been allowed from the time when the cause of action accrued. This question, Mr. Justice Markby observed, involved several contested propositions, *viz.*:—

1. That sections 11 and 12 of Act XIV. of 1859 apply to section 246 of Act VIII. of 1859.

2. That the plaintiff is under disability within the meaning of these sections.

3. That the benefit of these sections applies as well to the period during which the disability continues as to the period when the disability has ceased.

Upon the two first propositions, his opinion was in favour of the plaintiff; upon the third he held that whatever benefit the minor was to have was to accrue to him, not during the disability, but when the disability might cease; and accordingly that the present suit, being brought by him whilst still a minor through his guardian, must fail.

Upon the second of the propositions stated by Mr. Justice Markby, their Lordships cannot see how, in face of the plain language of the 12th section, there can be any room for doubt.

Upon the first they also agree with the learned Judge that sections 11 and 12 of Act XIV. of 1859 do apply to the 246th section of Act VIII. of 1859.

The two statutes were passed in the same year—the assent of the Governor-General being given to Act VIII. on the 22nd of March, to Act XIV. on the 4th o
The object of the first was to ena
al Code of Procedure for the Cour
Judicature not established by Roya
The object of the second was to e
general law of limitation in supe
both of the regulations which had
those Courts, and of the English
which had regulated the practice
Courts established by Royal Charter.
ing to the fifth sub-section of
section, and the 3rd and 11th sectio
XIV. of 1859, their Lordships have
that the intention of the Legislatu
the period of limitation, resultin
246th section of Act VIII., should in
of a minor, be modified by the oper
the 11th section of Act XIV.; and
construction has obtained in the Co
India appears from the case cited fro
3rd Weekly Reporter, C. R., p. 8.

In coming to this conclusion, their
ships have not failed to consider the
decision of this Board in the case of Me
mud Bahadoor Khan *vs.* The Collec
Bareilly (L. R., 1 Indian Cases, *p.*
That case, however, they think, is
guishable from the present. It arose
very special statute, and upon that g
the judgment rests. Their Lordships
said: "It was argued that the clauses
"general statute, Act XIV., 1859, re
"to disabilities, might be imported into
"Act, but this cannot properly be done.
"XIV. is a Code of limitation of gener
"plication. This Act is of a special
"and does not admit of those enactm
"being annexed to it." And they proce
to observe that the application of the
tute (if it did apply) would not assist
appellants, who would not even, in
case, have brought their suit in p
time.

This being so, the only other point
considered on this question of limitati
whether the learned Judge was right in
ing that an infant cannot, after the expir
of the year, bring a suit by his guar
whilst the disability of infancy contin
Their Lordships cannot agree in this
struction, which, it would appear from
cases cited by Mr. Bell (Ramchunder Ro
Umbica Dossee, 7 W. R. 161; Ram G
vs. Greedhur Ghose, 14 W. R. 429;
Suffuroonissa Bibee *vs.* Noorul Hossein,
W. R. 419) has not been accepted or
lowed by the Courts in India. It is un
sonable in itself, since it implies that
infant's claim, which is admittedly not bar

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too soon rather than too late; not be the policy of the law to e trial of claims. Again, to ren- a construction imperative, the y of the 11th section must be making the words "after the shall have ceased" precede, in- following, as they do, the words the same time." Their Lordships efore, of opinion that the plaintiff's not open to the objection that, in it concerns the properties in ques- Nos. 238, 240 and 245, it has not ought within the proper time.

next point to be considered is whe- e High Court was right in allowing all appeals, and in dismissing the plaint- it as to those portions of the joint estate which were the subject of them ground that the suit was wrongly d.

to be observed that the objection by the Division Bench to the frame of t, assumes the correctness of the an- iven by the Full Bench to the second questions referred to it, and is in the of a corollary from the proposition affirmed. The learned Judges of the on Bench argue that, if it be true that nter of a joint and undivided Hindu cannot alienate his undivided share in int family-property without the consent co-sharers, it follows that he cannot sue for his separate share. And they pon a decision in the 12th Weekly ter, page 83, in which it was ruled wo only of the members of a joint undivided family could not sue to set a charge created by one member of mily, and to recover their particular s in the property charged, but that the ust be brought by or on behalf of all members of the joint family. Their ships do not mean, in any way, to impugn thority of that case, or to dispute the al principle affirmed by it. They do however, think that the principle is cable to the peculiar circumstances of, ght to govern, the present case.

this case Sudaburt, the only other ber of this joint family, has, under the ice which was then allowed to prevail e Courts of India, succeeded in recover- and has been put into possession of his of the joint family-property. He can- be said to have any beneficial interest in ct of which he could now sue as plaint- and supposing him to have an interest, present plaintiff has made him a party to this suit in the only way in which a person who is unwilling or unable to be joined as plaintiff can be brought before the Court, *i.e.*, by joining him as a defendant. In that character Sudaburt has disclaimed all interest in the subject-matter of the litigation, alleging that he has already been put into possession of all to which he is entitled. Again, in most, if not all, of the appeals, the title of the substantial defendants is founded on execution-sales confined to that moiety of Bhugwan's share, which, on a partition, would now fall to the plaintiff. The objection to the frame of the suit was not taken by the substantial defendants; it seems to have originated with the Judges of the Appellate Court. It is one of form rather than substance; for it cannot be said that, if it does not prevail, the defendants (Sudaburt being a party to this litigation and admitting that he is in possession of his share) can be harassed by any second suit. On the other hand, if the objection prevails, the defendants will remain in possession of property to which, after full trial, they have been found to have no title, and the plaintiff will be left to the chances of another suit, in which he may be met by objections well or ill-founded on the lapse of time, or the effect of the decrees under appeal as *res judicata*. Their Lordships are of opinion that they ought not to allow the objection to prevail against the substantial justice of the case.

What has been said is sufficient to determine this appeal in favour of the appellant, so far as it relates to the decrees of the High Court in the nine appeals, numbered respectively 170, 224, 235, 239, 243, 244, 238, 240, and 245.

There is, however, as has been already stated, a further question as to the appeal numbered 234; and at the hearing, it occurred to their Lordships, who have unfortunately to determine this appeal *ex parte*, that, if the respondents had appeared, they might, without a cross-appeal, have contested the correctness of the answers given by the Full Bench to the questions referred to them, answers which are not in the form of a decree, or even of an interlocutory order. To the answer to the first question their Lordships think no objections could have been urged successfully. The second question, however, involves a point of Hindoo Law upon which the authorities are not altogether consistent; nor are their Lordships satisfied that the principle laid down by the Full Bench would, if correct, govern this particular case of which they will now

proceed to examine the circumstances somewhat more in detail.

The property to which it relates is thus described in the schedule to the plaint at page 8 of the record. The village is specified as Tulmanpore Bhada in two kalums (items). The share of the joint family is stated to be one of ten annas and eight pie. Of this, five annas and four pie are deducted as the share of Sudaburt Pershad, which reduces the share claimed by the plaintiff to five annas and four pie. The column of remarks contains the following statement:— "This mouzah was held in zur-i-peshgee lease under a zur-i-peshgee deed executed by Saligram Sahoy and Ramruchea Sahoy. It was sold at an auction on the 18th of November 1862, and purchased by the defendant Bikramajeet Lall for 3 rupees. The zur-i-peshgee and lease are fit to be cancelled."

Bikramajeet Lall and another defendant were the appellants in No. 238, which seems to have covered the whole of the five annas and four pie share of Tulmanpore Bhada, with other portions of the property in dispute. From what has been stated above it follows that their title, resting as it does upon a purchase at a sale in execution of a decree against the widows, is defective; that the right of the plaintiff to impeach it is proved, and accordingly their appeal ought to have been dismissed. This, however, does not determine the rights of the plaintiff as against the zur-i-peshgeedars. He may be entitled either to recover so much of the property as is covered by the zur-i-peshgee by setting aside the zur-i-peshgee lease, or merely to stand in the shoes of the nominal mortgagor. But the nature and extent of his right can only be determined in appeal No. 234.

The appellants, on that appeal, were the original zur-i-peshgeedars, Saligram Sahoy and Ramruchea Sahoy. The zur-i-peshgee deed is at page 423 of the record, and appears to have covered originally only 5 annas and 4 pie of the entire 16 annas of Mouzah Tulmanpore Bhada. If then it be true that Sudaburt Pershad has succeeded in recovering one moiety of this, the subject of the dispute on this appeal is the remaining moiety or a 2 annas and 8 pie share. And this appears to have been the view of the High Court, for their decree on this appeal (see pp. 479-80) is limited to a 2 annas and 8 pie share. If, on the other hand, Sudaburt has not succeeded in his suit in setting aside the zur-i-peshgee as against him, or in otherwise wresting possession of his share from the zur-i-peshgee lows that the question of the vali zur-i-peshgee remains to be deter tween the latter on the one side, and the present plaintiff on the other.

The plaint in this suit alleged n grounds for setting aside the zur-i of the 9th December 1859, and ind tained no special mention of it. The statement of the defendants, Saligr Ramruchea (p. 31), set up that de insisted on their rights under it. F of the issues are specially point validity of the deed. Nor do the or the decree (p. 439) of the Pri der Ameen deal with that questi that they decide with respect to th claimed in Tulmanpore Bhada is that iff be put in possession thereof in th ner in which possession has been by the decree of the 5th of April 18 Sudaburt).

This reference to the suit of Su makes it material to consider whether really was any adjudication upon this q in that suit. The suit, it will be reme ed, involved the right of succession whole of the property of which Bh Lall died possessed as between his and the surviving members of the family. The plaint which is set out at 226 of this record contains no specific ment touching the zur-i-peshgee deed 9th of December 1859, unless it be schedule (at p. 231), where in the co of remarks it is said "the deed to the of plaintiff's share ought to be amen The judgment of the Zillah Judge (put the share in Tulmanpore Bhada in first parcel which it found to be joint f property. So far it affirmed the ti Sudaburt and Hurreenath, and negativ title of the widows, to whatever inter it belonged to Bhugwan Lall at the ti his death. But, in answer to the 11th it expressly found (p. 571) that the executed by Mukhun, Bhugwan, or the partners were valid. The decree general decree for possession over the pr ties in the first list. The High Cour appeal, simply affirmed this judgment decree of the Zillah Court. Can it be that this judgment and decree import adjudication, touching the invalidity of deed of the 9th of December 1859, as ag the surviving members of the joint fa even if the plaintiff in this suit could c the benefit of such an adjudication. judgment, so far as it goes, is, on the fac

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r way. The terms of the decree t only that the plaintiff Sudaburt r as his share was concerned, to be ssession of the rights of Bhugwan. execution of that decree, he has it may be wrongfully, to dispossess, nt of his share, the zur-i-peshgee- circumstance cannot give title to iff.

what has been found by the High th respect to this appeal? The f the Full Bench expressly stated facts were not sufficiently stated to hem to say whether the nephew wan Lall could recover from the e, without redeeming the same, on of the mortgaged share or any of it. That statement, taken in ion with the general principle by them, imports that there was at that the execution by Bhugwan deed was without the consent of his rs or not for the benefit of the Mr. Justice Markby (at p. 466) ot consider this latter question, but says, "As no objection was made to erence to the Full Bench, I think we o accept its decision for the purposes case, and to hold that the appellants iled to establish their title."

hese circumstances there appears to been no real trial of the question n the plaintiff and the appellants in 34; and, therefore, assuming the prin- enunciated by the Full Bench in its to the second question to be strictly , their Lordships do not feel them- at liberty to reverse the decree in of the appellants, and to make a in favour of the plaintiff. This being ey abstain from pronouncing any n upon the grave question of Hindoo volved in the answer of the Full Bench second point referred to them, a ques- which, the appeal coming on *ex parte*, not be fully or properly argued before That question must continue to stand, now stands, upon the authorities, un- ed by the judgment on this appeal.

eir Lordships have felt some doubt as e form of the order which ought to be on appeal No. 234. The plaintiff has to establish his title to recover the gainst the zur-i-peshgeedars. He might, ver, have established such a title even is suit had a proper issue been framed determined. On the other hand, he has lished his title to the property, subject zur-i-peshgee. His rights may be prejudiced by the decree as it stands. The suit is an example of the inconvenience of embracing in one suit titles to various parcels of land, which, although having a common foundation, are different in many particulars, and are to be asserted against defendants having no common interest. Their Lordships have come to the conclusion that the dismissal of the present suit against the appellants in No. 234 ought to stand, but that the decree of the High Court on that appeal ought to be varied by adding a declaration that it is to be without prejudice to the right of the plaintiff to recover the lands in question on satisfaction of the zur-i-peshgee. This appeal, so far as it relates to No. 237 (the case given up by Mr. Cowie), must be dismissed, and the decree made by the High Court in that case affirmed. In the other nine cases, the decrees of the High Court must be reversed, and an order made, dismissing in each case the appeal to the High Court, with the costs of the appeal in that Court, and affirming the decree of the Principal Sudder Ameen as to the parcels of property which are the subjects of those appeals. The above will be the substance of the order which their Lordships will humbly recommend Her Majesty to make.

Their Lordships think that there should be no order as to the costs of this appeal.

The 24th March 1876.

Present:

Sir James W. Colvile, Sir Barnes Peacock, and Sir Montague E. Smith.

Adoption—Authority to Adopt—Madras Law of Adoption.

On Appeal from the High Court of Judicature at Madras.

Sri Virada Pratapa

versus

Sri Brozo Kishoro Patta Deo.

Where the widow of a zemindar claimed her husband's estate on behalf of an adopted son, putting in a document, authorizing her to adopt, which was alleged to have been executed by her deceased husband; and the rival claimant was a half-brother of the deceased, who would have inherited the estate but for the said document, but who was shown to have been on bad terms with the deceased (during his lifetime), the Privy Council, dealing with the document as one that bore a genuine signature, and was supported by antecedent probabilities, declared in favour of the plaintiff's claim.

HELD, also, however, that though in Madras a Hindu widow, not having her husband's express permission,

may, if duly authorized by his kindred, adopt a son to him, yet the permission must be given by some one within the undivided family and having a direct interest in the estate, and not by a distant relative.

RAJAH ADIKONDA DEO, the then holder of an impartible zemindary in the district of Ganjam, which in these proceedings is called sometimes Chinnakimidy, and sometimes Pratapagheri, died on the 23rd of November 1868. He left no legitimate male issue, but a widow, then *enceinte*, whom it will be convenient to designate by her title of Mahadevi. He had, however, several natural sons, one of whom, Ramakrishna Deo, contrived, on the death of his father, to be invested by some of the retainers with the "sadhi," and asserted a claim to the zemindary on the ground that he was, in fact, legitimate, and had been designated by Adikonda as his successor in an urzi signed by him on the 19th of November, and forwarded to the Collector. This claim has since been found to be groundless, and may be treated as no longer existent.

The appellant, Raghunadha, who was a half-brother of the deceased zemindar, must now be taken to have been an undivided brother, and the person who, according to the ordinary law of succession, was entitled to the zemindary on the death of Adikonda without a legitimate son, either procreated or adopted.

It is necessary, in order to explain some parts of the subsequent history of the case, to observe that the question of succession, when it first arose, was further complicated by the fact that the zemindary, though permanently settled, was one of those as to which it was then conceived that, owing to the omission to issue a permanent sunnud, the Government of Fort St. George had retained the right of nominating on the death of each successive holder his successor. The confirmation by this Board of the decision of the High Court of Madras in the Marangapury case (see Law Reports, 1 Indian Appeals, p. 282) has since established that there was no legal foundation for this pretension on the part of Government; and it must now be taken to be settled law that the title to the zemindary is to be determined by the ordinary law of succession in like cases.

On the day after that of the death of Adikonda, *i. e*, on the 24th of November 1868, the Mahadevi addressed an urzi to the Collector (p. 143), in which she stated the death of her husband; that the family was composed of women and children; that she had then none legally entitled to the taluq, but was three months gone with child; and prayed to be entrusted with the [illegible] this taluq. In this document she [illegible] mention of an authority to adopt.

It is shown, however, beyond all q[illegible] by the Collector's letter of the 2nd D[illegible] ber 1868, which is recited in the p[illegible] ings of the Board of Revenue at p. [illegible] the record, that before that date h[illegible] received a second urzi or letter fro[illegible] Mahadevi, in which she had alleged [illegible] was her husband's express wish that, [illegible] event of her having not a son but a da[illegible] she should adopt a son. And, if the [illegible] R at p. 64 of the record be that secon[illegible] or a true copy of it, there can be no [illegible] that, as early as the 26th of November [illegible] the Mahadevi had asserted publicly th[illegible] husband had, on the 20th of that m[illegible] executed in her favour a written author[illegible] adopt a son in the event which after[illegible] happened. The confusion which see[illegible] have taken place in the Civil Court [illegible] respect to the proof of exhibit R has [illegible] rise to a controversy on its authenticity w[illegible] will be afterwards considered. But, wh[illegible] may have been the precise contents of [illegible] second urzi, it is unquestionable that, as [illegible] as the 11th of December, the Maha[illegible] presented a formal petition to the Go[illegible] ment of Fort St. George in which she st[illegible] that Adikonda, before his death, executed [illegible] gave to her a putrica or will contain[illegible] words to this effect: "You have now c[illegible] ceived; if you bring forth a male child, [illegible] will be a Rajah to the taluq; in case o[illegible] female child, you are authorized to select [illegible] good child for the seat;" and that, in se[illegible] subsequent petitions and applications, [illegible] persistently put forward and relied upo[illegible] written authority to adopt executed by [illegible] husband. One of these, bearing date [illegible] 18th of March 1869, stated the date of [illegible] instrument to be the 20th of Novem[illegible] 1868; and in most of them she claimed [illegible] be heiress to the zemindary in default o[illegible] legitimate son, natural or adopted, of [illegible] husband. Raghunadha seems on his side [illegible] have been also asserting his claim before t[illegible] Government and the Revenue Authorities.

The action taken by the Government o[illegible] Fort St. George was as follows:—

The Board of Revenue, on the report of the Collector, had, on the 7th of January 1869, expressed its opinion that Raghunadha had the best claim to the zemindary, provided the Mahadevi did not give birth to a son; but that, if she should have a son, that son ought to succeed. Thereupon Government, on the 1st of March, ruled that

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a posthumous son would be entitled to the inheritance, and directed the Collector to take such measures as he might think fit to ascertain whether the widow was really pregnant, and to verify the sex of the child when born. To the widow's repeated applications it made answer that the claim to the zemindary was under consideration. On the 11th of July 1869, the Mahadevi was delivered of a daughter, and on the 17th of September in that year Government, in the exercise of its supposed power, and on the recommendation of the Collector, supported by the Board of Revenue, resolved (p. 143) to recognize Raghunadha, who had been reported by the Collector to be the undivided brother of the deceased zemindar, as the successor to the Chinnakimidy estate; thereby overruling the Mahadevi's claim to be heiress to her husband; and ignoring her asserted right of adoption.

Pending these proceedings there had been litigation between the Mahadevi and Raghunadha, touching the right to a certificate, under Act XXVII. of 1860, for the collection of the debts due to the deceased zemindar. This was determined in favour of the Mahadevi by the Civil Judge on the 31st of March 1869. But, on the 11th of February 1870, his decision was reversed by the High Court, and the certificate granted to Raghunadha, apparently on the general ground that the claim of an undivided brother was preferable to that of a widow; and that there was no satisfactory proof of division.

For some short time after the determination of the Government in his favour, Raghunadha and the widow seem to have lived together in amity. She retained, apparently with his consent, the custody of the keys of the goutaghoros or treasuries, in which the jewels, cash, and other valuables that had been left by the late zemindar were kept; but allowed Raghunadha to receive thereout both jewels and cash for the purposes of his installation, which took place on the 1st of February 1870. He again was in correspondence with the Collector in November, touching the villages to be assigned to her for her maintenance (pp. 115 and 116), and speaks of their friendly relations, although in one of his letters he complains that Haribondha Surmanto and two or three more wicked persons were "making intrigues and giving evil advice." But this state of amity, if it ever sincerely existed, was of brief duration. In the course of 1870 the parties again plunged into active litigation. In his suit numbered 9 of that year, Raghunadha sought to recover from the Mahadevi the jewels and cash in the goutaghoros, greatly exaggerating their amount and value, as property to which he was entitled as zemindar. In her suit No. 12 of 1870, she sought to recover from him the particular jewels and cash which had passed from her to him on the occasion of his installation, alleging that he had received them by way of loan on a promise to restore the former and repay the latter. Her suit was ultimately dismissed on the ground that she had failed to establish any such contract. In the other suit the material issues were whether Raghunadha was the undivided brother of Adikonda, or separate in estate from him; whether the Mahadevi, as widow of Adikonda, was entitled by right of succession to the money and jewels left by him; and, if not, whether Adikonda had made to her, at the time of his death, a gift of them that was valid against Raghunadha.

In this suit, the Civil Judge found that Raghunadha, the plaintiff, was the undivided brother of Adikonda, and that Adikonda, at the time of his death, did not make a gift to his wife of any part of the property then in dispute. He found, however, in the first instance, upon the second issue, that the Mahadevi, as widow of Adikonda, was entitled to all the money and jewels left by him; proceeding, apparently, on the ground that, inasmuch as each succeeding zemindar must be taken to have held the estate by virtue of a new grant from Government, he held it as self-acquired property; and consequently, that, on his death, his personal assets would pass to his widow to the exclusion of his brother. Before, however, a final decree had been drawn up in this suit, the Marangapury case was decided by the High Court of Madras; and the Judge thereupon granted a review of his decision. On that review, he found that the Mahadevi, as widow of the late zemindar, was not entitled to the money or jewels left by him; and finally made a decree in favour of Raghunadha, but for an amount much less than that claimed by him. There was no appeal against the decrees in these suits. They decided as between the Mahadevi and Raghunadha that the status of the family was that of indivision; and that Raghunadha being, in default of male issue of Adikonda, entitled to the estate, was entitled to the jewels and cash as appurtenant thereto. They have, however, little bearing on the questions now to be determined; although some of the depositions taken in them have been relied upon as

affecting the credibility of the testimony given by the same witnesses in the present suit.

Pending these two suits of 1870, and on the 20th of November in that year, the Mahadevi adopted the present respondent. He was the son of the zemindar of Piddakimidy, who is admitted to be a sapinda of Adikonda Deo, though separate in estate from him; both families being, as shown by the pedigree at p. 19, derived from a common ancestor, Purushottama Deo. Nor is the validity of the adoption impeached, except on the ground that the Mahadevi had not sufficient authority to make it.

On the 15th of December 1870, the respondent, by his adoptive mother and guardian, the Mahadevi, commenced his suit for the recovery from Raghunadha of the zemindary and of all the property appurtenant thereto with mesne-profits. The defendant, Raghunadha, originally set up, by way of defence, that his title as zemindar appointed by Government could not be questioned. But it is now admitted that, since the decision of the Marangapury case, this defence cannot prevail; and that the only questions to be decided are, whether the exhibit Q, which is propounded as the written authority to adopt, of the 20th of November 1868, was, in fact, executed by Adikonda Deo, and, if not, whether the adoption is not nevertheless valid according to the law that prevails in the Presidency of Madras, as one made by a widow without express authority from her husband, but with sufficient sanction and consent on the part of her husband's relatives.

The Civil Judge decided both these questions against the respondent. He came to the conclusion, both from external and internal evidence, that the document was a forgery; he was also of opinion that the requisite assent to an adoption, in the absence of an authority from the husband, was not given, and consequently that the adoption was not valid as against the defendant. The High Court inclined to the opinion that Q was, in fact, executed by Adikonda, but did not go very much into the evidence for or against the document, being of opinion that, even if no express authority was given by Adikonda, the adoption by the widow, being made with the consent of one of his sapindas (the father of the child adopted), was valid by the law of Madras.

Their Lordships propose to consider, first, whether Q was, in fact, executed by Adikonda.

It has been strongly urged upon th the judgments of the two Indian upon this question, though not conc are not directly conflicting, the High having omitted to find that the docu genuine, or fully to consider the e concerning it; that, in this state of their Lordships cannot safely overru decision, upon a question depending on the credibility of conflicting witne a Judge of great local experience wh and examined those witnesses, and ha pressed his conclusion in a judgment demonstrates with what remarkable car industry he tried the cause.

Their Lordships are, by no means, in sible to the force of the general propo involved in this argument. That however, seems to them to be some diminished by particular circumstance this case. They consider that the volumi judgment of the Civil Judge deserves credit due to a most painstaking endea to arrive at the truth in a difficult case. its excessive elaboration tends to impair value by defeating the proper object judgment, which is to support, by the cogent reasons that suggest themselves, final conclusions at which the Judge has scientiously arrived. This document rec the fluctuations of the Judge's mind day to day in the course of an exceptio long trial; the effect, often temporary, u him of a particular piece of evidence argument of Counsel; it subjects every ness to criticism more or less unfavourab and, from this mass of often conflicting st ments, it is not easy for a Court of App to extract the precise grounds on which final conclusion rests.

Again, the Counsel for the respond have strongly insisted on the objection to authority of this judgment, which th founded upon the observations of the lear Judge in paragraph 62, &c. (p. 376). must be admitted that the passage is am guous. If it means only that, where a ca has been manifestly proved to be false (as *e.g.*, if Q had been shown to be written on a stamp paper purchased after Adikonda's death), it is unnecessary to weigh general probabilities, the observation is a mere truism, since it is obviously idle to inquire whether it was likely a man should do that which it has been demonstrated he never did. On the other hand, if it imports that the Judge refused to weigh the probabilities of the case, because he believed one set of witnesses rather than the other, it would support the

objection taken, *viz.*, that in forming his belief he had excluded from his consideration that which ought to have entered into it. Their Lordships, however, upon a review of the whole judgment, are of opinion that, in whatever sense the learned Judge made the observation in question, he did not, in fact, fail to consider the probabilities of the case. Whether he gave due weight to them will be afterwards considered.

A more substantial objection to the judgment is that it does not dispose of the question as it was presented by the parties. The learned Judge was not content to find that Q was a forgery. By a careful examination and comparison of it with admitted signatures of Adikonda, he satisfied himself that the signature purporting to be that of Adikonda was itself forged. Yet the appellant (p. 255) had admitted that that signature, and the sankhu and chakrun (the emblems on it) were of his brother's handwriting; and the case made by him and his witnesses was that the forgery was effected by filling up, after Adikonda's death, a blank paper which had these genuine marks and signature upon it. Their Lordships agree with the Judges of the High Court in thinking that little weight ought to be given to a comparison of Oorya handwriting by an European Judge, however skilled and experienced, when opposed to the admissions of those who dispute the document. They feel bound, therefore, to assume, and that has been almost admitted in the argument addressed to them on the part of the appellant, that the signature of Adikonda upon Q is of his handwriting. It is obvious, however, that the erroneous conviction of the Civil Judge to the contrary may greatly have biased his estimate of the credibility of the plaintiff's story, and may have prevented him from duly weighing the improbabilities of that told by the defendant, which he did not adopt. The genuineness, therefore, of the signature of Adikonda is a circumstance which materially detracts from the general value and authority of the judgment of the Civil Judge; and their Lordships cannot but feel that they have to determine the question before them upon the evidence taken in the cause without the assistance which they generally find in similar cases in the judgment of one or the other of the Indian Courts.

That there is in this case a strong antecedent probability that Adikonda did authorize an adoption is incontestable. It does not rest upon mere presumption that on his death-bed he would desire to perform that general duty of imperfect obligation which prompts a childless Hindoo to supply the want of natural male issue by adoption. It is shown that the brothers, though legally undivided, were long on bad terms with each other. The strife began, as appears by the Collector's letter at page 106, on the death of their father in 1835, when there was a dispute as to their succession to the zemindary, Raghunadha claiming it as the eldest son of the then Mahadevi, though younger in years than Adikonda, who was born of a wife of inferior rank. This controversy was determined by the then Government, in the exercise of its assumed power, in favour of Adikonda. The strife, however, was embittered by subsequent quarrels between the brothers, and by the desperate attempt of Raghunadha, as late as 1852, to oust his brother by proving him to be illegitimate. In these circumstances, whatever may have been the precise relation of the brothers during the later years of their joint lives, there is a high degree of probability that Adikonda would desire to retain, by all means in his power, the zemindary in his own line; and would be unwilling to expose the wife, to whom he was attached, to the chance of falling from the rank, which even as adoptive mother of a reigning Rajah, she would possess, to that of a widow entitled only to be maintained, however honourably, by her brother-in-law.

There being then this antecedent probability that he would execute some such document as that which bears his admitted signature, what is the direct evidence to show that he really did or did not execute it? The witnesses whose names are upon it are Sumanto, the Treasurer, Siva Purohit, now the Dewan of Raghunadha, but formerly the servant in the like capacity, first, of Adikonda, and, afterwards, of the Mahadevi, Balaji, the scribe, and Damapattojosi, the Purohit. Of these, the two former are the only subscribing witnesses in the strict sense of the term; Balaji signing only as the writer of the instrument; and Damapattojosi, though named as a witness, not having signed at all. Again, the only one of the four who deposes to the execution of the instrument is Sumanto. His story (page 215) is that on the 20th of November (*i.e.*, on a day between which and the day of the Rajah's death two clear days intervened), at about 3 prohoros of the day (*i.e.*, about 3 P.M.), the Rajah sent the peon Narayana to call in any respectable people (Bollolokho)

that might be in the outer hall (Sodoro); that the peon returned with Siva Purohit, Damapattojosi, Bordhono Santo, Bhagirathipani, and Balaji; two other persons, *viz.*, Boyiduorahu and Gouro Bondhari, being already in the room when the order was given; that Balaji was then sent out to bring paper, pen, and ink; that on his return he wrote the authority to adopt under the Rajah's dictation, making first a draft, and afterwards a fair copy; that the list of witnesses which appear in Balaji's handwriting on it was also written at the Rajah's dictation, first, in the draft, and, then, in the fair copy; that the subscribing witnesses, Siva Purohit and the witness himself, then signed, Damapattojosi excusing himself, with the Rajah's consent, from signing, on the ground that he was an old man, and could not see; that Balaji also wrote his name as the writer of the document; that the Rajah himself traced the sankhu and chakrun at the top and wrote his own signature at the bottom of the document; that they all wrote with the same pen dipped in the same ink-bottle; that it took about 2 ghadyahs (1½ hour) to complete the transaction; and that afterwards, and when about the same space of the day remained, the witness, by order of the Rajah, took the document to the Mahadevi, who, while it was being prepared, was in "the chapel," being a room near that of the Rajah, and put it on the threshold, the door being ajar. The witness also states that nearly two ghadyahs before this, and previously to the preparation of the document, he had taken to the Mahadevi, by order of the Rajah, the keys of the Treasury House, and had said to her: "The keys of the other Treasury House were given you; now keep the keys of this Treasury and all the property therein."

This witness is directly contradicted by the three other persons whose names are upon Q, Siva Purohit, Balaji, and Damapattojosi. Their testimony in this suit is to be found at pages 189, 269, and 267 of the Record. The account which they give of the fabrication of Q is the following: About ten, or at most twelve, days after the death of Adikonda, Sumanto brought to Balaji a paper, having upon it Adikonda's signature, and the sankhu and chakrun, but otherwise blank, together with a draft, and told him to fair-copy the draft upon the blank paper. Balaji, according to his own account, at first refused, but afterwards obeyed. The result was Q, as it now stands, with the exception of the signatures of the subscribing witnesses. The paper in that state was by Balaji to Sumanto, who took it Purohit for his signature. He swe he refused to sign it, and denies signature upon it which purports to is of his handwriting. The value of denial will be presently considered. paper was subsequently (*i.e.*, about fo days after Adikonda's death) taken Sumanto to Damapattojosi, who also he refused to sign it as witness.

The question is which of these two is to be believed. The last their Lord think must be taken with the qualific that, notwithstanding the denial of Purohit, the disputed signature is of handwriting. That it is so was found by Civil Judge, and his finding does not de on mere comparison of handwriting. correctness seems to their Lordships placed beyond doubt by the exhibit L page 3, in which, writing to Iswara P as late as the 10th of July 1869, he sp of the document executed by the late R to the Mahadevi, and urges his corresp dent to use his best endeavours to get Government a recognition of it. It is therefore, that, if Q be a forgery, Purohit was at one time a consenting p to that forgery. The Civil Judge undoubtedly recorded a most unfavour opinion of Sumanto. He says of "H. S. lied and prevaricated grievously. could not believe anything one bit the readily from the fact that he asserted (Judgment, paragraph 54, page 320). the credibility of this witness, howe small, is nevertheless superior to that Siva Purohit and Balaji. Notwithstandi his demeanour he may have told what substantially a true story; whereas others must either have been guilty perjury in this suit, or have been consci actors in an antecedent forgery. Dama tojosi is not open to this imputation, and apparently a more respectable witness. that the Judge says against him is, that "protested too much." But there is a hi degree of improbability in his story.

The *primâ-facie* improbability that there should exist any blank paper with the genuine signature of the deceased Rajah upon it is no doubt removed by the evidence of Binayaka (p. 263), and the production of the four blank papers similarly signed, which that witness swears he discovered eighteen months before he gave his deposition (*i.e.*, early in 1870) in the late Rajah's record-box. There is, however, no proof

that, at the time when Q is said to have been forged, any such papers had been found; and the subsequent discovery of them may have suggested the present answer to the plaintiff's case. If, however, it be assumed that the supposed forgers had but one such paper in their hands ten days after the late Rajah's death, it is obvious that such a paper was very precious; and it is inconceivable that they would have inserted Damapattojosi's name in the list of witnesses until they were assured of his willingness to sign. If, again, they had then in their hands more than one such paper, they would naturally, on Damapattojosi's refusal to join in the conspiracy, have destroyed it, and fabricated a similar instrument on which his name should not appear. The story then told by him is less probable than that told by the plaintiff's witnesses in order to account for the non-signature of it by him; for he is shown to be a person of weak sight, and not to have been in the habit of writing with a pen. All these three witnesses against the document are shown to be now more or less dependent upon the defendant; and there is little, if any, other affirmative evidence in support of the defendant's case.

On the side of the plaintiff, however, there is a considerable amount of direct testimony in confirmation of that of Sumanto.

Of the witnesses in this category, who are vouched by Sumanto as present when it was prepared and executed, are Boyiduorahu, the native doctor, and Gouro Bhondhari, the barber, who are said to have been with the Rajah when he sent the peon to call in the respectable people (Narayana Bisoyi was the peon sent); and Bordhono Santo and Bhaghirathipani, who were brought in with Siva Purohit, Damapattojosi, and Balaji. They generally confirm Sumanto's account of the transaction. It is true that all are more or less discredited by the Civil Judge; that the barber is not relied upon even by the respondent as worthy of credit; and that the evidence of the peon, who says he was not continuously in the room, is of little value. But the others, particularly Bordhono Santo, who was related by marriage to Adikonda, seem to be of respectable position, are persons who were not unlikely to be present; and their statements, notwithstanding some slight discrepancies, in the main confirm Sumanto's account of the transaction. In further corroboration of the plaintiff's case, his Counsel rely on the evidence of the Mahadevi and of Iswara Puttro.

The latter is the vakeel, who, in 1868 and 1869, prosecuted the Mahadevi's claim before the Government at Madras. He seems to have been employed as a vakeel by Adikonda in his lifetime; and there is nothing to impeach his general respectability. His testimony is to the effect that having been sent for by the Rajah on account of some pending suit, he was at the house after the execution of Q; and that on the next day, that is, on the 21st of November, the Rajah being then in full possession of his faculties, told him that he had the day before executed in the Mahadevi's favour a written authority to adopt. This evidence does not justify the observation of the Civil Judge that "it amounts to nothing," since, if believed, it would establish a clear admission by the Rajah of his antecedent act. It is, however, open to the exception taken by Mr. Norton, *viz.*, that it is but evidence of an oral admission, said to have been made by a deceased person, and, as such, incapable of contradiction and open to suspicion. His presence, moreover, at the place at the time in question is not sworn to by any other witness, and is not very satisfactorily accounted for.

The evidence of the Mahadevi (p. 205) is to the effect that, on the morning of the 20th of November, she was weeping over the Rajah, who was very ill; that he told her, in the event of her not having a male child, to adopt one, and promised to give a written authority for the purpose; that in the evening of that day, whilst she was sitting within her room with the door a little ajar, Sumanto brought a paper and left it on the threshold, saying it was the authority to adopt; that afterwards, and when the lamp was lighted, *i. e.*, after sunset, she took the paper to the Rajah, nobody else being in the room; that he took it from her and said: "I have given you written authority—you are pregnant. You will bring forth a male child, if not you will adopt," and then returned it to her; and that she afterwards kept it in her box. She identified Q as that paper. She further deposed that the key of the goutaghoro was brought to her by Sumanto before he brought the document; and afterwards, in answer to a question not given in the record, said, "The keys and this written authority were given to me in the evening when there were two ghadyahs to sunset."

Of this witness the Civil Judge (p. 320) has recorded the following opinion: "On the face of her deposition, I see no reason to

think her untruthful, but rather the contrary; and yet in O. S No. 9 of 1870 she put forward, and supported with much evidence, three assertions on important facts which have been declared false, or have been disbelieved, *viz.* (*1st*), division between Adikonda and the defendant, it being admitted by her in this suit that they were undivided; (*2nd*) an examination of the treasuries showing that they contained but a small sum, with a view to reduce the amount recoverable by the plaintiff against her, if he should be successful in that suit; (*3rd*) the gift of the jewels and cash by Adikonda to her. And now she has put forward Q, which is certainly a forgery; she has supported it with much evidence; she has sworn that Adikonda himself, in speaking to her, acknowledged it as his; and she has contradicted the story told by all her witnesses."

Of the objection to the Mahadevi's credit, which the learned Judge founds upon Q, and the evidence given by her in support of its execution, it is enough to observe that he thereby begs the question which he had to try, *viz.*, whether it was a forgery or a genuine instrument. He would hardly have done this if he had not previously, and by comparison of handwriting, satisfied himself that the signature of Adikonda was itself forged. That this foregone conclusion, which must now be taken to be erroneous, must materially have affected his general estimate of the credibility of the plaintiff's witnesses is, therefore, shown bv the passage just cited from his judgment. Nor do their Lordships attach much more weight to his other objections to this lady's credit. They do not find any material contradiction between her statement in this suit and those of the other witnesses. There is undoubtedly a discrepancy as to the time when the key was delivered (as to which only Sumanto and the native doctor speak). But that the Mahadevi, a native woman examined from behind the purdah, should have made some confusion as to the time that elapsed between the two acts of delivery does not, in their Lordships' view, materially affect her credit. Again, her contention in the former suit, that her husband and the defendant were undivided brothers, may, under the circumstances, have been raised *bonâ fide*. The fact which was found against her cannot have been in her own personal knowledge, and it was one which, before that decree, was not perfectly clear. That she should have undervalued (if she did undervalue) the amount of property in the goutagboros will [illegible] nobody conversant with native suits in [illegible] On his side, Raghunadha grossly [illegible] rated the amount and value of that p[illegible] Again, the alleged gift of the jewe[illegible] cash to her was no doubt found by th[illegible] learned Judge against her. There ma[illegible] been no appeal against his decisio[illegible] adoption having then taken place), b[illegible] obvious that the fact of that gift is ag[illegible] issue in this suit, and that it was m[illegible] less determined in the other upon th[illegible] which this same Civil Judge then for[illegible] the credibility of the plaintiff's witne[illegible] this suit. There is, however, one ci[illegible] stance connected with that suit of 1870 [illegible] affects the credibility, not only of the M[illegible] devi, but of other witnesses for the pl[illegible] iff, and ought here to be considered. [illegible] circumstance is the date on which th[illegible] was said to have taken place. The M[illegible] devi, in that as in the present suit, de[illegible] that she received the key and the w[illegible] authority to adopt on the same day. [illegible] this is the story now told by those of [illegible] witnesses who, in their depositions in [illegible] former suit, were silent on the authority [illegible] adopt. But the date assigned to the g[illegible] the jewels throughout the suit of 1870 [illegible] "two days" before the Rajah's death, wh[illegible] in common parlance, would import, [illegible] seems to have been so understood, the [illegible] of November. The date assigned to [illegible] transaction in this suit is a date betw[illegible] which and that of the Rajah's death [illegible] clear days intervened, *i.e.*, the 20th [illegible] November.

This circumstance would be almost fa[illegible] to the plaintiff's case as to Q if it w[illegible] possible to suppose that that case had b[illegible] got up after the evidence in the jewel [illegible] was given. But the depositions in that [illegible] were taken in December 1870; and w[illegible] it is shown beyond all doubt that the Ma[illegible] devi had at least, as early as the 18th [illegible] March 1869 (in her petition at page 7[illegible] stated the date of the alleged authority to [illegible] the 20th of November; that the witnes[illegible] who impeach Q which bears that date ad[illegible] it to have been in existence ten days af[illegible] the Rajah's death, and say that Suman[illegible] was the concoctor of the fraud; it is im[illegible] possible to suppose that Sumanto would ever have treated the authority to adopt as executed only on the 21st. Nor, indeed, is it easy to see why the gift of the jewels should have been represented to have taken place on that day. One of the issues contested in the cause was whether Adikonda

was of sufficient mental capacity to make the gift; and the nearer to the time of his death the date of the gift was laid, the greater the difficulty of showing his capacity of making it. There may have been some strange confusion in the jewel suit as to the effect of the term "two days before his death," and misapprehension as to the date to which the witnesses then meant to depose. Their Lordships are unable further to explain this discrepancy; but, for the reasons above given, they do not think that it seriously affects the question now under consideration.

Their Lordships desire next to say a few words about two documents of which much has been said in the argument before them.

The first is E E at page 89 of the Record. Their Lordships are not inclined to adopt the statement of the defendant that he signed this security-bond without a knowledge of its contents. They do not, however, attach much weight to the words, "as soon as I or my son, from my giving him in adoption, get possession of our zemindary," as evidence in favour of the genuineness of Q; for the utmost that any inference to be fairly drawn therefrom would establish is, that, in January 1869, the defendant knew that the Mahadevi had asserted an authority to adopt (a circumstance which is otherwise probable); contemplated the possibility of the power being established and his son adopted under it; and was persuaded by his creditor to provide against such a contingency. Siva Purohit was at that time acting for the Mahadevi; and if Q were forged, the defendant would not then have had the knowledge, which he says he subsequently acquired, of the fabrication of the document. The most, then, that can be said of E E is that it contradicts his statement that he knew nothing of an alleged authority to adopt until a later period.

The other document is R. It is dated the 26th of November, and contains a distinct statement by the Mahadevi that her husband, on the 20th of November, executed in her favour a written authority to adopt to the effect of Q. It bears upon it the words (by whom written is not known), "Received 1st December evening, by hand, foul copy." The contention, on the part of the defendant, is that this document affords no legal proof of the contents of the second urzi, stated in the Collector's letter of the 2nd of December to have been received by him from the Mahadevi; and that the terms in which he refers to that urzi are consistent with the supposition that the Mahadevi then put forward only an oral authority to adopt —Q not having then been fabricated. What the Collector says on this point is: "In her second (letter) she adds that it was her husband's express wish that, if she brings forth a son, such son should succeed; if a daughter, that she (the widow) should then adopt a son." These terms are not necessarily inconsistent with those of R. All that can be said of them is, that they do not state affirmatively that she alleged her husband's wish to have been expressed in writing, or on a particular day.

It is now admitted on both sides that R is not the original urzi; that it is not an official copy of it, which, as such, would be receivable as evidence; and that if grounds had been laid for proving the contents of the missing urzi by secondary evidence, R has not been shown to be a true copy of it. Each side has imputed to the other foul play in respect of this document, but neither hypothesis is supported by proof or probable in itself. The proceedings afford some grounds for thinking that the original urzi, as well as R, was produced from the Collectorate, but it seems that, owing to a blunder, or, as suggested, a fraud on the part of a vakeel, R was shown to the witnesses who were at first examined upon it as if it were the original, and that the original, if ever before the Court, has slipped out of the record.

It is to be regretted that when the mistake was discovered, and the contest about this document arose, the Civil Judge did not further investigate, by inquiry at the Collectorate or otherwise, the history of R, and ascertain what had become of the original urzi. Either party might have called on the Judge to do this, but neither did so. It was suggested by Mr. Norton, in his reply, that their Lordships might now see fit to direct such an inquiry. They do not, however, think that they would be justified in thus prolonging this litigation, inasmuch as they do not consider that a knowledge of the precise terms of the second urzi is essential to the determination of the issue before them. It is no doubt true that, if the second urzi were in the terms of R, the Mahadevi must have asserted the existence of a written authority to adopt bearing the same date and to the same effect as Q before the date at which Q is said by the defendant's witnesses to have been fabricated. But this circumstance, though it would throw considerable discredit on the defendant's case, would not

conclusively disprove it; because it is possible that the document so said to exist might not have then actually come into existence. Again, if the second urzi were only in the terms of the Collector's letter, it would not, as has before been observed, be inconsistent with the existence of a written authority to adopt. Their Lordships will, therefore, deal with the questions before them on the assumption that the precise terms of the second urzi have not been proved, and leave the plaintiff to bear the burthen of having failed to establish that, before the 2nd of December, the Mahadevi asserted that she had a written authority of a particular date; and the defendant to bear that of having failed to show affirmatively that she then asserted only a parol authority. They now proceed to consider the grave objections to the genuineness of Q, which the learned Counsel for the defendant have founded on the form and appearance of the document.

Their Lordships have the original before them, and, so far as they can judge, some of these objections are, to say the least, plausible. The list of witnesses in the handwriting of the writer of the instrument is unusual. It is also unusual for the witnesses to sign before the executing party, and to write their signatures immediately above his. The form of the instrument might naturally be expected to be that of exhibit Xd (p. 77), the translation submitted to Government by the Mahadevi's vakeel with her petition of the 26th of July 1869; and it has been contended, on the part of the appellant, that that exhibit was purposely so modified in order to avoid the suspicions which a more literal translation of Q would have engendered. Lastly, it was contended that the appearance of the document is inconsistent with the evidence which represents that all the signatures were written at the same time, and with the same pen and the same ink; the fine signature of Balaji being written after those of the subscribing witnesses. Their Lordships were certainly at first much impressed by the last objection. It is, however, to be observed that, after insisting on the impossibility of all the signatures being written with the same pen, the Zillah Judge, on the 26th of November 1871 (p. 311), saw fit to record that, having just had to look again at Q, he thought it quite possible, though not very likely, that with the pen that made the last "ro" of Sumanto's signature Adikonda might write as well as his signature is written; and a good writer like Balaji might write as finely as his sig is written. Very different appearance certainly be produced by the same p ink when used by different hands; a is more likely to happen with the com that is used by the natives of India.

Again, as regards the objection found Xd, it is to be observed that it seems satisfactorily answered by the Judge b at p. 318, who finds that Xd is, in the translation of a Telegu version taken down probably by a Telegu man the mouth of Iswara Puttro, there pro being few persons at Madras who could or translate an Oorya document like Q.

Of the list of witnesses, it is sufficie say that it is difficult to see why it sh have been inserted in Q, if it were not by the order of the Rajah. The sugge on the other side is that it was inserte order to fill up the space above the Ra signature on the blank paper. But su forger would have had no difficulty in panding the document so as to fill up vacant space. Nor, as their Lordships already remarked, is it likely that a fo would have inserted the name of Damap josi in that list until he had ascertained ther that person was willing to sign.

Upon the whole, then, their Lordsh dealing with this document as one wh bears the genuine signature of Adiko and as containing a disposition which he likely to make, and weighing the evide and the probabilities in favour of the pla iff's case, against the evidence and the p babilities in favour of the defendant's c have not, without doubt or difficulty, co to the conclusion that the former so prep derates over the latter that they ought pronounce in favour of Q as a valid writ authority to adopt executed by Adikonda the 20th of November 1868.

This finding is, of course, sufficient dispose of the present appeal, and rend it unnecessary for their Lordships to consid whether, if it had been the other way, th could have affirmed the decree of the Hig Court upon the grounds stated in the jud ment of Mr. Justice Holloway. The gre importance, however, of the subject induce them to make some observations upon it.

That, according to the law prevalent in the Dravada country, which includes the district in which the Chinnakimidy zemindary is situate, a Hindoo widow, not having her husband's express permission, may, if *duly authorised by his kindred*, adopt a son to him, is a proposition which cannot now

be controverted. The law has been so settled by the decision of this Committee in the Ramnad case; and the principles and authorities upon which it rests are elaborately considered and reviewed both in the judgment of the Committee, 12 Moore's Indian Appeals, p. 269, and in the judgment of Mr. Justice Holloway in the same case, 2 Madras H. C. R., page 206.

The two judgments, however, though agreeing in this general conclusion, which was all that was necessary for the determination of the cause, were by no means *ad idem* on several points, and notably on the nature of the authority required.

Mr. Justice Holloway intimated an opinion that, if the requirement of consent is more than a moral precept, the assent of any one of the husband's sapindas would suffice. This Committee was far from adopting that broad proposition. It pointed out that on the question, who are the kinsmen whose assent will supply the want of a positive permission from the husband, the authorities are extremely vague; that there exists a broad distinction between cases in which the deceased husband was a member of a joint and undivided Hindoo family, and those in which, he being separated, the widow has taken his estate by right of inheritance; but that, even in the latter case, the assent of some person who stands to her in the relation of protector may be requisite. It is unnecessary to repeat at large this portion of their Lordships' judgment on that occasion which is to be found at pages 441 to 443 of Mr. Moore's Report.

The question has since come before the Sudder Court of Travancore in the case reported in the "Madras Jurist" of February 1873, and before the High Court of Madras in the present case. In the Travancore case the Court, though a foreign Court not bound by the decisions of this tribunal, in a judgment of remarkable ability and research, adopted the principles suggested by this Committee as those which should govern the determination of the question in the case of an undivided family, and ruled that the assent of certain separate dayadies of the deceased husband was not sufficient to validate an adoption by a widow, to which the husband's undivided brother and the head of the undivided family had not assented. In the present case Mr. Justice Holloway, adverting to what was said by this Committee in the Ramnad case, concerning an undivided family, observed: "Whether this be so or not, it has no application to the present case in which the property is to be held in severalty, and not in coparcenary." And he finally formularized the following propositions:—

1. The adoption by the widow, with the assent of a sapinda, is a substitute for the actual begetting by a sapinda.

2. That the argument from analogy is in favour of the assent of one sapinda rather than more.

3. That his assent is not to supply a capacity for rights, but a capacity for action.

4. That proximity to the deceased with respect to rights of property is wholly beside the question, and, if this were not so, the rule would be entirely defeated.

5. That in the present case that capacity has been sufficiently supplied, as in the law which this assent of sapindas has superseded, a child begotten by this assenting sapinda would have been undoubtedly legitimate.

Their Lordships cannot adopt these propositions as a correct exposition of the law.

They observe, in the first place, that they are all more or less founded on the assumption that the law of adoption now prevalent in Madras is a substitute for the old and obsolete practice of raising up seed to a deceased husband by actual procreation; and that the limitations, if any, upon the power to adopt are to be traced by analogy from that practice. In the Ramnad case (12 Moore's I. A., p. 441) their Lordships, after stating their general conclusion, added the following observations: "They think that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindoo Law, or upon analogies, real or supposed, between adoptions according to the Dattaka form, and the obsolete practice with which that form of adoption co-existed, of raising up issue to the deceased husband by carnal intercourse with the widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient treatises above referred to, and in particular by the Dattaka Mimansa of Vidya Narainsamy, the author of the Madhavyam; but, as a ground for judicial decision, these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention."

To these remarks of their predecessors their Lordships adhere. They desire further to observe that it is to their minds extremely doubtful whether the supposed analogy is sufficient to support Mr. Justice Holloway's

propositions in their integrity. The myth of Satyavaty referred to by Narainsamy, and most of the texts relating to the obsolete practice which are to be found collected in Colebrooke's Digest and elsewhere, all imply an authority external to the widow as the justification of her act, an act repugnant to the general rule of asceticism and celibacy imposed upon Hindoo widows. Most of the texts speak expressly of "the appointed" kinsman. By whom appointed? If we are to travel back beyond the Kali age, and speculate upon what then took place, we have no reasonable grounds for supposing that a Hindoo widow, desirous of raising up seed to her deceased husband, was ever at liberty to invite to her bed any sapinda, however remote, at her own discretion; and that his consent, of itself, constituted a sufficient authorization of his act.

Positive authority, then, does not do more than establish that, according to the law of Madras, which in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay, a widow, not having her husband's permission, may adopt a son to him, if duly authorized by his kindred. If it were necessary, which in this case it is not, to decide the point, their Lordships would be unwilling to dissent from the principle recognized by the Travancore case, *viz.*, that the requisite authority is, in the case of an undivided family, to be sought within that family. The joint and undivided family is the normal condition of Hindoo society. An undivided Hindoo family is ordinarily joint, not only in estate, but in food and worship; therefore not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly or by implication delegated the task of regulation. The Hindoo wife upon her marriage passes into and becomes a member of that family. It is upon that family that, as a widow, she has her claim for maintenance. It is in that family that, in the strict contemplation of law, she ought to reside. It is in the members of that family that she must presumably find such councillors and protectors as the law makes requisite for her. There seem to be strong reasons against the conclusion that, for such a purpose as that now under consideration, she can at her will travel out of that undivided family, and obtain the authorization required from a separated and remote kinsman of her husband.

Mr. Justice Holloway, however, not ly determining anything adversely principle affirmed in the Travancor distinguishes the present on the grou although the family must be taken undivided, the particular property is held in severalty, and not in copar It is not necessary for the determi of this appeal that their Lordships decide whether this distinction can b ported, and they abstain from do They may, however, observe that a tion which is founded on the nat property seems to belong to the property, and to militate against the pri which Mr. Justice Holloway has strenuously insisted upon elsewhere (2 ras H. C. R., p. 229), *viz.*, that the of an adoption is to be determined by tual rather than temporal considera that the substitution of a son of the de for spiritual reasons is the essence o thing, and the consequent devolution of perty a mere accessory to it.

Their Lordships desire further to ob that, even if the distinction suggested adopted, it would be necessary, in ord maintain the present adoption as one made without the permission of the hus to go the full length of ruling that assent of one separated and distant sap (and that the natural father of the taken in adoption) is an authority suffic to validate the act.

Mr. Justice Holloway, indeed, in one p treats Raghunadha as an assenting part the exercise of the power to adopt, tho not to the particular adoption.

Their Lordships, however, are of nion that even this general assent is established by E E, or by the other evide in the cause. The parol testimony on point is untrustworthy; and E E, tak it at its highest, is consistent with supposition that Raghunadha then inten only to provide for the contingency of Mahadevi's establishing the authority adopt, which she said she had derived fr her husband, and exercising it in favour his son. It must, therefore, be taken t the only sapinda of Adikonda, who is show to have assented to this adoption, is the Raj of Piddakimidy, the father of the adopte child; and their Lordships have already intimated their grave doubts whether such assent would in any case have constituted a sufficient authority.

In the present case there is an additional reason against the sufficiency of such a

assent. It is admitted on all hands that an authorization by some kinsman of the husband is required. To authorize an act implies the exercise of some discretion whether the act ought or ought not to be done. In the present case there is no trace of such an exercise of discretion. All we know is, that the Mahadevi, representing herself as having the written permission of her husband to adopt, asked the Rajah of Piddakimidy to give her a son in adoption, and succeeded in getting one. There is nothing to show that the Rajah ever supposed that he was giving the authority to adopt, which a widow, not having her husband's permission, would require.

Their Lordships have deemed it right to make these remarks, though not essential to the determination of the present appeal, because this doctrine of the power of a widow, not having her husband's express permission to adopt a son to him, which, before the decisions in the Ramnad case, had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of Madras. It may be the duty of a Court of Justice administering the Hindoo Law to consider the religious duty of adopting a son as the essential foundation of the law of adoption; and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and it may be, in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it; and the propositions of Mr. Justice Holloway appear to their Lordships calculated unduly to enlarge those limits.

Their Lordships have further to observe that the decree, as it stands, makes the defendant accountable for mesne-profits from the time when he was placed in possession by the order of Government. That was about September 1869. At that time Raghunadha was, in default of a son of Adikonda, natural or adopted, unquestionably entitled to the zemindary. The adoption took place on the 20th November 1870, and the plaint states that the cause of action then accrued to the plaintiff. The plaint itself was filed on the 15th of December 1870, and there is no proof of a previous demand of possession. Their Lordships are of opinion that the account of mesne-profits should run only from the commencement of the suit. They think that the decree, with that modification, ought to be affirmed, and they will humbly advise Her Majesty accordingly. But their judgment must be understood to proceed on the establishment of Q as a genuine permission to adopt; and not upon the ground upon which the High Court principally relied. The costs of the appeal must follow the result.

The 12th May 1876.

Present:

The Hon'ble W. Ainslie and E. G. Birch, *Judges.*

Joint Hindoo Family—Personal Decree—Co-sharers in Execution-sale.

Case No. 2216 of 1875.

Special Appeal from a decision passed by the Judge of Sarun, dated the 10th July 1875, reversing a decision of the Second Moonsiff of Pursa, dated the 30th May 1874.

Doorga Dutt Singh and others (some of the Defendants), *Appellants,*

versus

Pearee Lall (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

No one for Respondent.

Where an auction-purchaser sought to recover possession of the rights of a judgment-debtor who was one of five co-sharers in an undivided Hindoo family, and contended that the judgment-debtor was manager for the whole family, all whose interests had therefore gone in the sale, but the co-sharers contended that no more than the one-fifth share of the judgment-debtor had been purchased, HELD that, as there was nothing in the documents filed by the auction-purchaser to show that the sale covered more than the individual share of the judgment-debtor, or that the first Court intended it to do so, the sale-certificate must be taken as disposing of only the interest of the individual judgment-debtor.

Ainslie, J.—THE plaintiff in this suit is the auction-purchaser of the rights and interests of one Ram Bhurosee Singh in Mouzah Ramghuri, sold in execution of a decree obtained by the Court of Wards representing the Rajah of Durbhangah. The plaintiff alleges that by this sale 8 annas of

the village passed to him. The defendants, on the other hand, set out that Ram Bhurosee was only one of five members of a Hindoo family, who held between themselves eight annas of the village, and that Ram Bhurosee's interest was only one-fifth of the eight annas.

The first Court found that the plaintiff had obtained possession of a fifth share of half of the village, and that he was entitled to no more, and dismissed the suit.

The second Court has reversed that judgment, and has come to the conclusion that the five persons who held the half of the village formed an undivided family; that Ram Bhurosee Singh was the managing member of that family; and that the sale in the suit of the Court of Wards passed the interest, not only of Ram Bhurosee Singh, but of the entire family.

The first point to be noted is that this is not the case set up in the plaint. If the plaintiff intended to charge the other members of the family on account of a decree obtained against Ram Bhurosee, and a sale of his interest following on that decree, he should have framed his suit in such a way as to give them distinct notice of this intention. What the result of such a suit would have been it is not for us to say.

The Judge has also found that the debt for which the sale was held was a charge on the whole property. But we think that there is no evidence upon which the Judge could properly come to this finding.

Then there is another point which is fatal to the claim of the plaintiff, namely, that there is no evidence on the record, except the admission of the defendants, as to the extent of the interest of Ram Bhurosee Singh purchased by the plaintiff. The sale-certificate is in the usual form, merely setting out that the rights and interests of Ram Bhurosee in a certain village had been sold Now, *primâ facie*, these are the rights and interests of the individual. Before it can be said that the sale-certificate covers more than his individual share, it must be shown that it was the intention of the creditor and of the Court holding the sale to deal with something more than that particular share. It was necessary for the plaintiff in this case to bring the attachment-proceedings, or the notification of sale, especially the latter, into Court, to show that. at the date of the sale, there was really an intention to deal with so much as an eight-annas' share of the property, supposing that Ram Bhurosee held that share.

The case, therefore, fails at the outset, for the plaintiff has come into Court sub[illegible] document which does not indicate the [illegible] of the rights conveyed by it to obtai[illegible] which at first sight he seems to have no[illegible] to, namely, the rights of Ram Bhu[illegible] co-sharers, and he has not attempted to [illegible]ply the defect by producing the record [illegible] proceedings which terminated in the [illegible]

We cannot allow the case to pass fr[illegible] without observing that, in the course [illegible] judgment, the Judge has imported [illegible] of personal knowledge, or, as he styles [illegible] notoriety into the case which should not [illegible] been taken into consideration at all. [illegible] case had to be decided on the evidence [illegible] the record as brought before the Co[illegible] the parties, and not on anything within [illegible] personal knowledge of the Judge, or [illegible] thing which, in his opinion, is matter [illegible] notoriety.

We regret that in this case we have [illegible] had the assistance of argument in suppo[illegible] the judgment; but at the same time we [illegible] it right to say that the appeal has been [illegible]ducted with perfect fairness and moderat[illegible]

The judgment of the Lower Appe[illegible] Court will be reversed, and the judgme[illegible] the first Court will be restored with co[illegible] this Court and in the Lower Appellate C[illegible]

Birch, J.—I concur.

The 12th May 1876.

Present:

The Hon'ble W. Ainslie and E. G. Bi[illegible]

Judges.

Finality of Order refusing Rehearing after [illegible] parte Decree.

Case No. 2049 of 1875.

Special Appeal from a decision passed [illegible] the Subordinate Judge of Gya, d[illegible] the 17th August 1875, affirming a d[illegible]sion of the Moonsiff of Aurungab[illegible] dated the 3rd October 1874.

Rung Lall Misser (Plaintiff), *Appellant,*

versus

Tokhun Misser and another (Defendants), *Respondents.*

Baboo Abinash Chunder Banerjee for Appellant.

Mr. Younan for Respondents.

Where a plaintiff had obtained an *ex-parte* decree, and the first Court had refused a rehearing to the defendant who applied for it after the proper time, but the District Judge had granted a rehearing at which the

plaintiff failed to make good his case, HELD that all the proceedings subsequent to the order for the rehearing were illegal, and must be quashed.

Ainslie, J.—THIS case is really a very simple one, although a good deal of time has been expended over it.

The plaintiff, who is the special appellant before us, instituted a suit against the defendant, and obtained an *ex-parte* decree on the 5th of July 1873. On that decree, a warrant of execution was issued on the 9th of August of the same year. On the 11th of November following, the defendant put in an application for a rehearing under section 119. After taking a report from his office, the Moonsiff rejected the application; and it is apparent, and it has not been denied, that this application was made more than two months after the time limited by section 119 for the making of such applications.

From this order there was an appeal to the District Judge. The District Judge did not consider, or at any rate did not, by his order, determine, whether the application was within time or not; apparently he treated that as a matter of minor importance, and, going direct to the merits of the application, held that the defendant was entitled to a rehearing.

On the rehearing the plaintiff failed; he failed also before the Judge. He now comes to us on special appeal, and the points which have been urged before us are, that, whereas section 119 provides a definite limit of time beyond which an application for a rehearing shall not be entertained by the Court, the order of the Judge, admitting the application, and all the proceedings following thereon, have been done without sanction of law; and that in this appeal from the decree, the appellant has a right to question every order of the Subordinate Courts leading up to the decree objected to.

Section 119 of the Code of Civil Procedure says that, in all cases in which the Court shall pass an order under this section for setting aside a judgment, the order shall be final. But it is contended, on the strength of a Full Bench judgment reported in 20 Weekly Reporter, page 84, that the word 'final' does not mean final absolutely, but final for the time; that the order by itself shall not be open to appeal; but that, whenever the case is opened by an appeal from the decree, that order, as well as every other interlocutory order, may form the subject of appeal.

There can be no doubt that, if a case under section 119 cannot be distinguished in principle from a case under section 378, we ought to follow the ruling of the Full Bench. Though we are not constrained by a positive rule of the Court, we ought not to refuse to be guided by a decision on a matter which appears to us to be strictly analogous; it is for the respondent to satisfy us that the supposed analogy does not really exist, and that he has failed to do.

Independently of this, there is a reported case exactly in point decided by Mr. Justice Jackson and Mr. Justice McDonell to be found in 22 Weekly Reporter, page 5; and the view taken by Mr. Justice Jackson is this: that a Court acting under section 119 has jurisdiction to act under the particular conditions specified by the section; but, unless an application can be shown to be within those conditions, the Court has no jurisdiction whatever to entertain it. After referring to that portion of the section which I have read above, he says: "Therefore, if "it appears that the Court had passed an "order otherwise than under this section, "there would be no finality, and it has been "held in a matter very much analogous to "this, *viz.*, where an application to review a "judgment has been admitted, and where a "decision afterwards takes place on rehear-"ing, and that decision comes to the Lower "Appellate Court on appeal, that the Lower "Appellate Court is competent to look into "the question whether the admission of the "review has been in accordance with the "restrictions imposed by the law."

On the face of these proceedings it is manifest that section 119, which strictly limits the period for making an application for rehearing to thirty days, to be computed from definite starting points, absolutely barred the hearing of the application by the first or any other Court.

It has been argued that the plaintiff had a remedy by motion in this Court under section 15 of the Charter Act. It may be conceded that he had a remedy, but no authority has been shown to us for the proposition that, if a man has two remedies, and does not choose to take the one, he shall forfeit the other. If the plaintiff has a right to appeal against this order, the fact that he had a right to question it by motion under section 15 cannot take away the former right. It was also urged that it is a matter of discretion with the Court to give to, or withhold from, plaintiff the advantage of the limitation prescribed in section 119. But, if this is a point that he may fairly and properly raise in special appeal, it is not a matter of discretion with the Court. Our

judgment is claimed on this point, and we can neither refuse to decide it in favour of the plaintiff, nor, having decided it in his favour, can we refuse to give him the benefit of the decision.

The result is, that the order made for the rehearing of the case, and dated the 25th June 1874, and all the proceedings subsequent thereto, must be quashed, and the whole of the costs of these proceedings must be paid by the respondent.

Birch, J.—I concur.

The 12th May 1876.

Present:

The Hon'ble W. Ainslie and E. G. Birch, *Judges.*

Lessor of Co-sharer—Removal of Building.

Case No. 2653 of 1875.

Special Appeal from a decision passed by the Judge of Sarun, dated the 16th August 1875, reversing a decision of the Moonsiff of Chuprah, dated the 6th August 1874.

Doorga Lall and another (two of the Defendants), *Appellants,*

versus

Lalla Hulwant Sahoy and another (Plaintiffs), *Respondents.*

Baboo Boodh Sen Singh for Appellants.

Baboo Doorga Doss Dutt for Respondents.

A lessee of co-sharers stands in the place of co-sharers, and, where some co-sharers in an estate sought to get their right acknowledged in respect of some lands which other co-sharers had leased out, and also sought to have a *thakoorbari*, which the lessee had built on it, removed, HELD that the right of the protesting co-sharers to the land in suit was clear enough, but that, in order to acquire the right to remove a building, it was necessary, not merely to have alleged non-consent, but to prove that objections had been offered before the building was raised.

Ainslie, J.—IN this suit the plaintiffs are some of the co-sharers of a certain property, and the defendant, Doorga Lall, is the lessee of the other co-sharers. The defendant, with the permission of certain co-sharers, entered upon a portion of the land constituting the joint estate, and has built thereon a *thakoorbari*. The plaintiffs sue to recover, as against the co-sharers, joint possession of this portion of the joint estate, and to obtain as against the lessee, the builder of the *thakoorbari*, an order of the Court to remove that building.

As far as the decree of the Lower A Court declares the common owners plaintiffs and the lessors of the def it is unobjectionable; but, so far as it if it does declare, that the building removed, it cannot be supported.

There seems to be some doubt wh fact, the decree of the Lower Appella did direct the removal of the buildi it was intended to do so, it has be imperfectly drawn up. The respond claimed it as a decree under which entitled to remove the *thakoorbari* therefore we have treated it as such dealt with the case as if the decree ha tained a formal direction to that effect

This case falls clearly within the pri laid down by the late Chief Justic BarnesPeacock, in the case reported in th to the case in 16 Weekly Reporter, pa The lessee of the co-sharers stands place of the co-sharers. In such a su absolutely necessary for the plaintiff to out, not only that he had not joined lease, but that he had not acquiesced building. The words used by Sir Peacock apply exactly to this case. He "It appears to me that, even if the defe had not a strict legal right to build the upon the joint land, that this is not a c which a Court of Equity ought to giv assistance for the purpose of having the pulled down. A man may insist upo strict rights, but a Court of Equity is bound to give its assistance for the enfo ment of such strict rights."

If the plaintiff had shown that he protested at the first, then no doubt the C would have assisted him. But, if he by and allowed this man to expend his m without warning him that he intende contest his right to build, he must not e any aid from the Court.

It was said by the respondent that case is incomplete, inasmuch as there finding of the Judge on the questio plaintiffs' acquiescence.

To show that a judgment is incomplet to show that the decree following on it been improperly made. If the object to obtain a remand, I think it ought not to granted. When a man sues his co-sharer the lessee of his co-sharers for the remova a completed building on the joint land, he not only to allege non-consent, but also allege and prove that he did not stand by but that he warned the builders that he wo not consent; or else such circumstances

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deprive them of a right to rely on his silence. This was not tried, because it was not alleged.

The judgment of the Lower Appellate Court in so far as it directs, if it does direct, that the building erected by the appellant, defendant, should be removed, is reversed. The rest of the judgment against which there is no appeal will stand. The costs of this appeal must be paid by the respondent.

Birch, J.— I concur.

The 12th May 1876.

Present:

The Hon'ble G. G. Morris, *Judge.*

Arrears of Rent—Value of Produce—Payment in Kind.

Case No. 2246 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of Rajshahye, dated the 2nd August 1875, reversing a decision of the Moonsiff of Serajgunge, dated the 31st March 1875.

Krishto Bundhoo Bhuttacharjee and another (Plaintiffs), *Appellants,*

versus

Rotish Shaikh and another (Defendants), *Respondents.*

Baboo Sreenath Banerjee for Appellants.

Baboo Doorga Mohun Doss for Respondents.

The Rent Act recognizes payment in kind; and where there is an agreement to pay rent in crops, and the produce is not paid, a suit for the money-value of the produce, at the time when it ought to have been paid, will lie as a suit for arrears of rent.

THE suit must, I think, be treated as, and deemed to be, a rent-suit. The plaintiff sues to recover from the defendant as his "Borgo" tenant a sum of money which represents the value of that share of the produce of the land which he, the defendant, had agreed to give him as rent. The fact that plaintiff sues, not to recover the crop itself, or rather the half of it to which he is entitled, but the money-value of it with interest, does not withdraw the suit from the category of rent-suits. The Rent Act, section 2, recognizes payment in kind as rent. Non-payment in kind, therefore, must be deemed to be an arrear of rent, and, as such, a suit may be brought to recover it within three years from the last day of the Bengalee year in which it shall have become due. But, inasmuch as the actual grain is not producible at any time within three years from the time when it became due, the money-value of the grain, as it stood when it was ready for delivery, and ought to have been delivered, must necessarily be taken to represent the grain itself. This has been the rule recognized by our Courts in dealing with suits like the present brought for the money-value of produce when the rent is payable on the metayer system. See the case of Luchmun Pershad *vs.* Hoolas Mahtoon and others, reported in Volume XI., Weekly Reporter, page 151. In this view the only ground taken in special appeal fails, for an appeal did lie to the Judge from the order passed by the first Court in this suit. The appeal is dismissed with costs.

The 12th May 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Separate in Food and Business—Acquisition by Marriage—Separately acquired.

Case No. 11 of 1875.

Regular Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 22nd August 1874.

Beharee Lall Roy and another (Defendants), *Appellants,*

versus

Lall Chand Roy (Plaintiff), *Respondent.*

Baboos Mohinee Mohun Roy and *Kishoree Mohun Roy* for Appellants.

Baboos Bhyrub Chunder Banerjee and *Anund Chunder Ghosal* for Respondent.

Where a younger brother sought to recover a half share of certain property held by his elder brother, alleging that the said property was ancestral, and that he was one in food and business with his brother; and the Subordinate Judge found that the property had been separately acquired by the elder brother from his father-in-law, but held that the younger brother was entitled to a half share, because he was shown to have lived and worked with his brother for some years, HELD by the High Court that, as the father of the two brothers had left them no property, as property acquired by marriage from a father-in-law is a separate acquisition, and as the younger brother was proved to have lived with his elder brother in a menial capacity, the younger brother was not entitled to any share in the property in suit.

Macpherson, J.—IN this case the plaintiff brought his suit against his elder brother,

Manick Chunder Roy, claiming to be entitled to a half share of certain property held by Manick Chunder, and which, the plaintiff alleged, was joint family-property acquired by the use of ancestral funds and joint moneys, and by the exertions of himself and Manick Chunder. The plaint stated that the plaintiff and Manick Chunder, using ancestral and joint funds, established and carried on together certain shops and trade.

The defendant Manick Chunder died before any written statement was filed; and he is now represented in this suit by his two sons. They defend the suit contending that the plaintiff has no interest whatever in the property claimed, which, they say, belonged to Manick Chunder alone, and was not acquired through the use of ancestral funds, or in any way by the exertions of the plaintiff.

The Subordinate Judge has found that the father of the plaintiff and Manick Chunder left them nothing, and that there was no ancestral property. He also found that, as a fact, Manick Chunder got the shop and business, which are the principal subject of the present suit, from his wife's father, Ram Jeebun Roy. But the Subordinate Judge further found that, although the shop and business were acquired by Manick Chunder from his father-in-law, the plaintiff lived joint in food with Manick Chunder, and they both were employed in carrying on the business, and, holding that the brothers had been all along joint and working together, he gave a decree in favour of the plaintiff. The Subordinate Judge says in his judgment that the plaintiff is a wholly uneducated person, who can neither read nor write. He says: "From the appearance "of the plaintiff I am led to believe that "he must have been engaged in a low pro-"fession; his appearance shows him to be "like one who carries on his business by "bearing loads on his head." These observations as to the condition and appearance of the plaintiff are of considerable importance as corroborating the defendants' story that the plaintiff was not joint in food or estate with their father, but lived separately from him, obtaining a livelihood (so long as he supported himself independently) sometimes by acting as a hawker of goods at fairs and the like, carrying about his goods on his head, and sometimes by acting as charandar in charge of boats coming down to Calcutta.

The defendants' case is, that, some thirty-five years or more before his death, Manick Chunder left his father's house and w and went and settled in Ramchunde where Ram Jeebun Roy, his father-i took him into his business—first, empl him as a gomashta, and, shortly after giving him a share in the concern.

This went on till 1853 (1260), when Jeebun Roy retired altogether, and made the shop and business to Manick Chu who carried it on till his death. Their further is, that, after Manick Chunder s in Ramchunderpore, and became a p in Ram Jeebun's business, the plaintiff taken by his parents while still a chil Ramchunderpore, but that he never with Manick Chunder; that Manick Ch resided always in his father-in-law's h and the plaintiff never lived with him, had any connection with him in busines anything else, until, during the last seve eight years of Manick Chunder's life, w the plaintiff being in great difficulties, without the means of supporting hi Manick Chunder gave him a room in house in which he allowed him to live, employed him in doing odd jobs about shop. The defendants admit that, du these last years of Manick Chunder's the plaintiff lived in a room in their fat house, and did attend in the shop; but say that the only work he did was of a almost menial, kind, and they deny altoge that he was ever employed with busi generally, or had anything whatever to with its management.

The plaintiff's case is, that, from the ti when he first went to Ramchunderpore, at all times was joint in all respects, and li with his brother.

We agree with the Subordinate Judge finding as a fact that the sons inheri nothing from their father, and that Ma Chunder got this shop and business from father-in-law, Ram Jeebun, in consequence his having married his daughter. But differ from the Subordinate Judge as regar his finding that the brothers always li together and carried on the business joint We think it proved that the defendan story is substantially true, and that the plain iff was entirely separate from his brothe in food and business, except that, during th last seven or eight years of Manick Chun der's life, he allowed the plaintiff to occup a room in his house, and gave him employ ment in the shop, not as a gomashta or manager, but as a servant. We think it clear that the business was managed and carried on throughout by Manick Chunder alone,

and was his concern only. The evidence of the old lady, Gouri Dossia, sister of the plaintiff and of Manick Chunder Roy, appears to us especially deserving of credit, and it entirely confirms this view.

The shop and business having been acquired by Manick Chunder from his father-in-law, being in fact given to him on account of his having married his daughter, was, according to Hindoo Law, property separately acquired by him, in which his brother was entitled to no share.

In the Dayabhaga, Chapter VI., section 1, verse 9, we find the following: "So Menu "likewise says: 'Wealth, however acquired, "by learning, belongs exclusively to him "who acquired it; and so does anything "given by a friend, received on account of "marriage, or presented as a mark of res-"pect.'" And in the annotations on this we find, on the authority of Sreekishna, that the words "on account of marriage," as here used, mean "received from a father-in-law on account of becoming his son-in-law."

This verse and the annotation in fact meet the exact case which has occurred here. We have no doubt that the shop and business having been acquired from and through the father-in-law exclusively became the separate property of Manick Chunder. On the whole we think that the decree of the lower Court must be reversed, and the plaintiff's suit dismissed.

The Subordinate Judge has given himself much unnecessary trouble in setting out in his judgment (pp. 21-24) a series of questions which the defendants wanted to ask the plaintiff by way of cross-examination. The Subordinate Judge disallowed these questions, and states at length his reasons for so doing. It seems to us that the Subordinate Judge would have saved himself a vast deal of trouble and a great waste of time if he had allowed these questions to be put. Moreover, many of the questions were quite proper, and such as the defendants had a right to put. And, if the witnesses who have given evidence in this suit had been cross-examined with reasonable care and intelligence, the case would have been placed before us in a far more satisfactory manner than it has been. The Subordinate Judge seems to forget that it is not from witnesses who merely report a story by rote that the real facts of a contested case can be ascertained, and that it is all important that the Court should, by cross-examination, satisfy itself that the witnesses are speaking to matters within their own personal knowledge, and are not merely telling a story which they have been taught.

The judgment of the lower Court is reversed, and the plaintiff's suit dismissed with all costs.

The 8th March 1876.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Limitation—Refund of Costs.

Case No. 179 of 1875.

Miscellaneous Appeal from an order passed by the Officiating Judge of Patna, dated the 14th August 1874.

Mullick Mahomed Yakoob (Judgment-debtor), *Appellant,*

versus

Chowdhry Shaikh Zuhoorul Huq (Decree-holder), *Respondent.*

Mr. C. Gregory for Appellant.

Moonshee Mahomed Yusuf for Respondent.

On an application for refund of money deposited as costs, which was alleged to be barred by limitation, HELD that, as litigation was protracted between the parties for many years, and the question of liability for costs remained unsettled all that time, limitation would run, not from the date of the original order entitling applicant to refund, but from the date of the conclusion of the proceedings in the final appeal.

Kemp, J.—THE judgment-debtor is the appellant in this case.

An application was made to the Judge for a refund of Rs. 894 odd paid in as costs under a decree given in favour of the defendant. The application was made on the ground that the petitioner, under the decree of the High Court dated the 7th of July 1863, was wholly exempted from all liability.

The first contention in the Court below was that the application was barred by limitation. On the other hand, it was contended that, after the decree of the High Court of 1863, further litigation went on between the parties, which was concluded by the decision of the Privy Council in 1873.

The Judge, however, held that the deci-

sion of the High Court exempted Mussamut Jummaee from all liability only in respect of her personal rights; and that she was not absolved in her capacity of representative and heiress of her father, Waris Ali. The application was, therefore, rejected.

The argument before us has been a very long one, and all the proceedings in this case, which extend from 1854 to 1873, have been referred to. These proceedings have been characterized by the Privy Council in their decision as a "labyrinth of intricate and irregular proceedings from which it is not easy to find the way to a definite end." We are, however, relieved from considerable labour and responsibility in this matter, because we are only acting in a ministerial capacity to execute the decree of the High Court.

There is no doubt, taking this decree as it stands, that Mussamut Jummaee was absolved from all responsibility in both capacities. And, from the observations made by the Privy Council, it appears that they also took the same view of the case, namely, that "the decree of the High Court stood unreversed," and that "the decree releasing her altogether was left standing." Therefore, looking to the decree of the High Court alone by which we are bound, we must hold on the first point that Mussamut Jummaee was exempted altogether under the terms of that decree.

Then comes the question whether her present application is barred by the Statute of Limitation. It appears that execution was taken out by Mussamut Jummaee for the costs which were awarded to her by the decree of the High Court; and that the present application was made for a refund of the money which Mussamut Jummaee paid in on the 16th of May 1862.

It is contended by the respondent before us that the judgment-debtor was bound to apply for the refund of this sum within three years from the date of the decree of the High Court of 1863. On the other hand, it is contended by Mr. C. Gregory, who appears for the appellant, and we think rightly, that the question as between Mussamut Jummaee and the opposite party, namely, whether Mussamut Jummaee was exempted by the High Court altogether as contended by her, or only in her personal capacity, and not as representative and heiress of her father, was not decided until 1873. We therefore hold that this application is not barred.

The order of the Judge is reversed, and this appeal decreed with costs. Vakeel's fee, five gold mohurs.

The 15th May 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Separate Decrees—Continuous Proceedings in Execution—Limitation.

Case No. 31 of 1876.

Miscellaneous Appeal from an order passed by the First Subordinate Judge of Bhagulpore, dated the 29th January 1876.

Chowdhry Hureehur Singh and others (Judgment-debtors), *Appellants,*

versus

Baboo Hridoy Narain and others (Decree-holders), *Respondents.*

Baboo Abinash Chunder Banerjee for Appellants.

Mr. R. E. Twidale and *Moonshee Mahomed Yusuf* for Respondents.

Where a plaintiff obtained separate decrees against several persons in respect of several duties which they were to perform separately, and the plaintiff chose to proceed in the first instance against some, and then against others, in taking out execution, HELD that proceedings taken at different times were not continuous proceedings in execution, and that limitation must run separately from date of latest action in each case.

Markby, J.—FROM the statement of facts which the parties have laid before us, it appears that in this case the Government and the present appellants were sued in one suit for possession of certain land and for mesne profits. The result of that litigation was that there was a decree against all the defendants jointly for possession of the land and as to mesne-profits, a direction that certain portion of them, a specified sum, should be paid by the Government, and another portion of them, also a specified sum, should be paid by the appellants.

An application was then made for execution of the decree against all the defendants in that suit, and those proceedings were struck off on the 26th July 1868. They were resumed on the 1st May 1869; but, at the request of the judgment-creditor, they were resumed, not against all the parties, but against the Government alone. Then those execution-proceedings finally terminated on the 13th April 1874 by the party having obtained possession of the land, and by the Government having paid the sum of money which, by the decree, they were directed to pay.

On the 13th July 1875, an application was made to enforce, as against the remaining judgment-debtors, who are the present appellants, that part of the decree which directed them to pay a certain sum for mesne-profits; and the question is whether this application is barred by the law of limitation.

It is contended, first, that this was a joint decree, and that proceedings were going on upon this decree continuously up to the 13th April 1874. It is even then doubtful whether the application would be in time, because, upon the last previous application, notice appears to have been issued on the 6th July 1872; but in our opinion this decree cannot be looked upon as one joint decree against all the parties to the litigation. In respect of each of the different directions contained in the final order of the Court, it must be considered that there is a separate decree. The case, in our opinion, is governed in this respect by the Full Bench decision reported in the 19 Weekly Reporter, page 30, where Sir Richard Couch says, in a similar case, that we must treat a decree of this kind as what it must have been by law, namely, a decree against several persons in respect of the several duties which they were to perform. Although the defendants were jointly ordered to give up possession, the Government separately was ordered to pay one sum of money, and the appellants separately were ordered to pay another sum of money. The order upon the appellants to pay the sum of money which we are now asked to compel them to pay must, therefore, be treated as a separate decree from the rest of the final order of the Court.

The other argument was, that this is a continuation of the proceedings upon the original application of 1866. That seems to have been the view taken by the Court below. The Subordinate Judge refers to a decision reported in 23 Weekly Reporter, page 183, as supporting that view. But, as there explained, it will depend upon the circumstances of each case whether, when the execution-proceedings are suspended and resumed, it is to be considered that they are resumed upon the old application or commenced anew upon a fresh application.

In this case we think that we ought to consider that the proceedings were commenced anew on the 1st May 1869 upon a fresh application, for the old proceedings were then discontinued, as far as appears, simply because the judgment-creditor did not choose to go on with them; there was nothing to impede his continuation of the proceedings had he chosen to do so. And when, in July 1868, they were resumed, it was in a different form, being taken against one of the parties only instead of all.

Then the Subordinate Judge also held that section 15 had some application to this case. Now there is one question arising under section 15 with regard to which there is some conflict of decision in this Court, namely, whether section 15 applies to applications for execution at all. Upon this we express no opinion. It is not necessary to do so, because, in the view we have taken of the nature of the decree, it is clear that section 15 cannot apply to this case. We think, therefore, that the decision of the Subordinate Judge is wrong, and must be set aside; and the application for execution dismissed with costs.

The appellant will also have the costs of this appeal.

The 16th May 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Ancestral Property—Excepted Debts—Responsibility of Manager.

Case No. 86 of 1875.

Regular Appeal from a decision passed by the Second Subordinate Judge of Patna, dated the 30th December 1874.

Shah Wajed Hossein (one of the Defendants), *Appellant*,

versus

Baboo Nankoo Singh (Plaintiff), *Respondent*.

Messrs. Arathoon and *C. Gregory* for Appellant.

Baboo Mohesh Chunder Chowdhry and *Moonshee Mahomed Yusuf* for Respondent.

In a suit to set aside a sale of ancestral property, in which it was contended, *firstly*, that the debt, in satisfaction of which the sale had taken place, was contracted for an immoral purpose; *secondly*, that a debt might be immoral either in respect of the object for which it was contracted or in respect of the means by which the money was obtained; and, *thirdly*, that in any case the judgment-debtor could only sell his own half-interest, and not the half-interest which his son had in the property, HELD that, as the debt represented liabilities which the judgment-debtor had incurred in making *bonâ fide* for his employer a contract which

that employer had repudiated, it was properly binding on his son; and that the son's inchoate interest in the property, which would ripen on the father's death, was not a separate half-interest in the estate, the father's whole interest in which had passed in the sale.

Garth, C.J.—THIS suit was brought by Nankoo Singh, the son of Parichit Narain Singh, to obtain possession of, and to set aside an execution-sale of, certain property in the Patna District, subject to Mitakshara Law, upon the ground that the decree under which the sale took place was obtained against Parichit Narain Singh (the father) for a debt contracted by him on his own account, and not on account of the family, a debt which it was not necessary for him to have contracted, and which in point of fact was contracted for immoral purposes; that, under these circumstances, the family-property being ancestral, derived partly from the plaintiff's great-grandfather, and partly purchased by his grandmother out of the proceeds of ancestral estate, was not liable to be sold to satisfy the father's debts; and that at any rate the plaintiff was entitled to one-half of the property, as the father's share and right in it alone passed by the sale.

The answer made by the purchaser of the property, the first defendant, was that he bought it *bonâ fide* at the execution-sale; and that the debt, in respect of which the decree was obtained, was not contracted for immoral or any other improper purposes; and that the debt was one which the son himself would have been bound to discharge.

The Judge in the Court below has found that the property was ancestral; that the purchase by the defendant was *bonâ fide;* and that the sale passed the father's interest in the property; but he considered that, as father and son had a joint interest, the father's share and interest, or one-half share only of the property, passed by the sale to the defendant; and he consequently decided that the plaintiff was entitled to the remaining half share.

In this Court it has hardly been contended that the property is not ancestral; but an attempt has been made to show that the debt in respect of which the decree was obtained comes within the description of those excepted debts which a son is not bound to discharge. Moonshee Mahomed Yusuf urged that a debt may be immoral, either in respect of the objects for which the money is borrowed, or of the means by which it is obtained; and that in this case the indebtedness of Parichit was the result of his own fraud; that the transaction consequently immoral, and not binding his son; and that, therefore, the pr being ancestral was not liable to be execution of such a debt.

But it appears from the decree to our attention has been called that the action which gave rise to the loan in substance thus: Parichit, acting pro edly as agent for another party, lease principal's land to a third person.

The principal repudiated the lease having been made without his auth Parichit failed to show that he had authority; and consequently the lease annulled, and Parichit himself incu heavy liabilities. To meet these liab he borrowed Rs. 900 from Mussamut funnissa, secured by a mortgage of the perty in suit, which was the debt which the decree was obtained.

Under these circumstances, we think impossible to say that the debt was properly or unreasonably contracted. was one which the son himself would, matter of pious duty, have been bound discharge; and we consider that in respect at least the case is governed by principle laid down by the Privy Co in the late case of Gridharee Lall another *versus* Kantoo Lall and others Muddun Thakoor reported in 22 We Reporter, page 56.

We are of opinion, therefore, that the to the defendant under the decree a valid one; and we think that under sale the defendant purchased the wh and not only one-half share, of the perty.

It is a mistake to suppose that father son had several undivided shares in family-estate. The father was, in fact, possession of the whole; and, although might not have had power to dispose of for immoral purposes, so as to defeat son's inchoate rights, he had still such entire proprietary interest that, when rights and title were sold under a decr *bonâ fide* obtained upon a debt proper contracted, and which the son, in the eve of his father's death, would have been bou to pay, the whole interest passed to purchaser under that sale.

We think, therefore, that the appeal of the defendant should be decreed with cost that the appeal of the plaintiff should be dismissed with costs; that the decree of the

Court below awarding one-half of the property to the plaintiff, should be amended, and judgment entered for the defendant, and that the defendant should have his costs against the plaintiff in both Courts.

The 16th May 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Rights of Co-sharers—Damages for Exclusive Possession—Injunction against Indigo Cultivation.

Case No. 85 of 1875.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Tirhoot, dated the 30th December 1874.

Mr. Lloyd (one of the Defendants), *Appellant*,

versus

Mussamut Bibee Sogra (Plaintiff), *Respondent*.

Mr. J. T. Woodroffe for Appellant.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Respondent.

Where a suit was brought to recover possession of certain lands in which plaintiff and defendant were co-sharers, and to secure damages for the exclusive possession which defendant had enjoyed for some years, and to obtain an injunction against defendant to prevent him from cultivating indigo on the land in suit without the consent of the plaintiff, HELD that, though a suit for partition is the best means of settling difficulties between co-sharers who will not agree, every co-sharer in an estate is entitled to joint possession with every other co-sharer, and has a right to prevent any one not having a right of occupancy from cultivating any portion of the land contrary to his or their wishes, and is also entitled to damages for any exclusive possession which can be shown to have been enjoyed:

HELD, also, that it would be an ineffectual way of enforcing plaintiff's right in this case to allow the adverse possession of the defendant, and to let plaintiff recover damages from time to time.

Garth, C.J.—IN this case the plaintiff sues to recover possession, jointly with the defendants Nos. 1 and 2, of 69 beeghas 12 cottahs of land, situate in Mouzah Mahomedpore, and also to recover damages from the defendant for retaining exclusive possession of the same lands during the years 1278, 1279, 1280, and a portion of 1281 F. S.; and she also prays for an injunction against the defendant No. 1 to restrain him from growing indigo or other crops upon the land in question without her consent. The Lower Appellate Court has made a decree in the plaintiff's favour, awarding her the joint possession with defendants Nos. 1 and 2, which she asks; awarding also damages at the rate of Rs. 3 per beegha during the above period; and also an injunction against defendant No. 1, restraining him from taking, retaining, or giving to others exclusive possession of the land as against the plaintiff.

It is stated in the plaint, and admitted on both sides, that the plaintiff is the owner of what we may call a 12-anna share in the land in question; that, up to the year 1272, the defendant occupied the entire mouzah (including this land) under a lease from the proprietors, and cultivated it with indigo and other crops; that, upon the expiration of that lease, he became the owner of a 2½-anna share, and obtained a lease from defendant No. 2 of another 1½-anna share, and that he has continued to cultivate the whole of the land since the lease in the same way as before without the plaintiff's consent, and has not paid her any rent or compensation for doing so.

The answer which the defendant makes in his statement is very vague and unsatisfactory; and we consider that he ought either to have been ordered to amend it, or that he should have been examined personally in order to ascertain what his real case was.

The 3rd para. in his statement impugns the correctness of the area as stated by the plaintiff; but as the defendant does not explain what particular lands he does or does not occupy, and as the Court below has found against him upon this point, and as the correctness of the Court's judgment in this respect is not impugned in the grounds of appeal, he has no right to question in this Court the correctness of the lower Court's decision in this respect. In the same way in para. 5 the defendant says, that the "zerait" lands of his vendors (elsewhere said to consist of 5 beeghas) are included in the 69 beeghas 12 cottahs, which are mentioned in the plaint; but as he is unable to say where the zerait lands are, or to give any other particulars respecting them, he cannot, of course, expect the Court to decide in his favour a point which he cannot explain himself, and upon which he has given no evidence.

Then in para. 4 the defendant makes a claim to this effect: He says that indigo and other crops were grown on the land by

him for upwards of 12 years with the consent of all the proprietors; that he has now himself become a part-proprietor; and that as other part-proprietors consent that he should still use the land in the same way, he ought to be allowed to do so, notwithstanding that plaintiff withholds her consent, as long as he is willing to pay her a fair rent for her share.

It is difficult to see upon what legal ground the defendant can hope to establish this claim. He puts it forward in his grounds of appeal, as if he had acquired the status of an occupancy-ryot; but this is of course quite out of the question. It is not 12 years ago since defendant ceased to be the lessee under a lease of the whole village; and if, whilst he was such lessee, he exercised the landlord's right to occupy and cultivate lands not in the occupation of tenants, it was as landlord, and not as tenant, that he held them. If, as a matter of fact, the defendant was a ryot of any of the lands in dispute, or if he has acquired the rights of any other ryots in any of those lands, he has entirely failed to allege or to prove it; he has, therefore, clearly no right of occupancy in the sense in which that term is used in Act VIII. of 1869 (B. C.).

His real position appears to be this:—

The plaintiff is a holder of a 12-anna share in the property; and the defendant, partly in his own right and partly as lessee of defendant No. 2, is the holder of the remaining 4 annas. Since the expiration of his former lease of the whole mouzah, he has held exclusive possession of the entire property in question, and cultivated it with indigo and other crops without the plaintiff's concurrence, and without having come to any arrangement with her; and he now claims as his right to hold this exclusive possession despite of any objection which she may make, and to cultivate the land with indigo or other crops as he pleases without her concurrence.

He contends, moreover, that, even assuming he is wrong in this view of her right, the Court ought not, in their discretion, to grant an injunction restraining him from thus holding and cultivating the land, inasmuch as the effect of such an injunction would probably be to leave the land uncultivated and waste, and, moreover, that the plaintiff's delay in instituting the suit disentitles her in equity to such an injunction.

We are of opinion, however, that, both upon principle and authority, the defe contention is quite untenable.

It is impossible to contend, wi semblance of reason or justice, that a co-sharer in an undivided property right to possess himself of any portio to the exclusion and without the a of his co-sharers, and to deal with cultivate it as he will, without their tion. We take it to be perfectly cle every co-owner of such property is e to take a part in determining how be used, unless restrained by local c or special agreement. If authority needed for this proposition, it is not sary to go further than some of the which were cited to us in argument b Woodroffe himself.

In the case of Gopal Pandey *vs.* St (20 Weekly Reporter 168), which suit by a 4-anna shareholder of land f injunction to restrain the remaining anna shareholder from carrying on, out the plaintiff's permission, the cultiv of indigo on the joint estate, it was de by Mr. Justice Phear and Mr. J Ainslie, that, as the plaintiff was part of the whole and every part of the property, he could either claim to oc the land jointly with the defendant, insist that it should not be occupied b other person except with his consent that, inasmuch as the defendant had exclusive possession of the land, the p iff was entitled to an injunction, restra the defendant from excluding plaintiff the joint possession, and from taking, r ing, or giving exclusive possession of property.

In that case Mr. Justice Phear rem "The lands have not been partitioned, "therefore, the plaintiff, as holder of "undivided 4-anna share, is part-own "every beegha of the whole mouzah, "by virtue of that right of ownersh "apprehend that he can claim eithe "occupy the land himself jointly with "defendant or defendant's assignee or "insist that the land shall not be occu "and used by any person (excepting alw "persons having a right of occupan "otherwise than with his assent."

In another case, Nundun Lall a another *vs.* Lloyd (22 Weekly Report page 75), the same learned Judge, with th concurrence of Morris, J., observes: "O "shareholder alone in a joint estate or his "assignee cannot claim to cultivate any "portion of the property which is not his

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"zerait land exclusively without the consent of the other shareholders, merely on the ground that he is willing to pay a reasonable rent for it."

In another case, reported in 24 Weekly Reporter, page 393, Mr. Justice Birch and myself decided that one shareholder had no right to sue another shareholder for exclusive possession or rent of a portion of the joint estate of which the defendant had taken possession; and this case was relied upon by Mr. Woodroffe as showing that the proper remedy in such a case was by a suit for a partition.

We certainly did suggest in that case that a partition and an account would probably be the best way of settling the disputes between the parties, inasmuch as they were disposed to come to no arrangement amongst themselves, and were holding one another at arm's length; but it was very far from our intention in that case to say that a suit to recover joint possession or for an injunction might not have been maintained.

We need not say that we most thoroughly appreciate the unfortunate position which has been so forcibly described by Mr. Woodroffe, in which both the land and its owners may be placed in this and other instances by the co-sharers refusing to be reasonable, and to come to any amicable arrangement among themselves with reference to the cultivation or letting of the joint property; but this is a misfortune which is inseparable from a tenure of this description, and if the parties find it impossible, under such circumstances, to agree, probably the only solution of the difficulty would be by a partition, however undesirable for some reasons such a partition may be.

With that, however, the Court has nothing to do.

We have only to determine the relative rights of the parties in this suit, and we consider that the plaintiff is clearly entitled to have what she asks, *viz.*, a possession of the whole of the land conjointly with her co-sharers.

We think, moreover, that, under the circumstances, the only effectual mode of enforcing the plaintiff's right as against the defendant is by granting an injunction in the terms awarded by the Court below.

The defendant has no right to complain of any delay which has occurred, inasmuch as that delay operated rather as an advantage than a disadvantage to himself; and it would obviously be an ineffectual mode of enforcing the plaintiff's rights to leave her, as Mr. Woodroffe suggested, to bring her action for damages from time to time against the defendant for excluding her from possession of the joint property.

The case which we have already referred to, decided by Phear and Ainslie, JJ., in 20 Weekly Reporter, page 168, is a clear authority, if it were needed that, in a case of this kind, an injunction is the proper remedy.

We, therefore, confirm in all respects the judgment of the lower Court, and dismiss the appeal with costs.

The 16th May 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Decree outside of Plaint or Issue.

Case No. 405 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of Tipperah, dated the 2nd December 1874, reversing a decision of the Additional Moonsiff of Amirgaon, dated the 24th January 1874.

Bhaygo Mutty Bibee and another (Defendants), *Appellants,*

versus

Mahomed Wasil (Plaintiff), *Respondent.*

Moulvie Serajul Islam for Appellants.

Baboo Bharut Chunder Dutt for Respondent.

Where a plaintiff brought a suit to establish his title, and the lower Court, on a trial of the issue, thought the title was not proved, yet gave plaintiff a decree on the ground of his being in possession for a long time, HELD that the lower Court ought not to have given a decree upon a ground not suggested in the plaint or in the issues tried.

Macpherson, J.—THE plaint in this case is extremely long, and exceedingly confused and unintelligible, and the Court to which it was presented ought not to have received it in its present form. But it is clear that the plaintiff sued to establish his title, relying upon his title as purchaser from Mahomed Azim and Mahomed Sommi, and upon nothing else.

In the Court of first instance the parties went to trial upon this question of title only.

The Lower Appellate Court apparently agrees with the first Court in considering that the title is not proved, but considers nevertheless that the plaintiff ought to have a decree upon the ground of his having been in possession for a very long time. This was not the question on which the parties came into Court, and possession was not the basis of the plaintiff's case.

The Lower Appellate Court ought not to have given a decree in favour of the plaintiff upon a ground which is not suggested in the plaint or in the issues tried. The proper course for the lower Court to have taken was simply to have dismissed the plaintiff's suit if he failed to prove his title, following the example of the Court of first instance.

The appeal is allowed, and the plaintiff's suit is now dismissed with all costs.

The 22nd May 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Suit by Guardian—Suit in Forma Pauperis—Liability for Costs—Judgment and Decree.

Case No. 43 of 1876.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 8th February 1876.

Brijessuree Dossia (Judgment-debtor), *Appellant,*

versus

Kishore Doss and another (Decree-holders), *Respondents.*

Baboos Joy Gobind Shome and *Bussunt Coomar Bose* for Appellant.

Baboos Unnoda Pershad Banerjee, Ashootosh Dhur, and *Kalee Mohun Doss* for Respondents.

Where a guardian obtains permission to sue *in formâ pauperis* on behalf of a minor, the rejection of the suit supplies no ground for throwing the costs of the suit on the guardian; and where the terms of a decree do not make any such distinct order as to costs, no expression of opinion in a judgment can import any such liability for costs into the decree.

Macpherson, J.—We are of opinion that there are good grounds for this appeal, and that execution cannot properly be issued against Brijessuree personally. It is quite clear that the right to execute depends upon the terms of the decree which was in the suit, and that that decree cann supplemented by any subsequent expre of opinion by the Judge.

The order which the Judge makes in concluding paragraph of his judgment di very materially from the formal de drawn up and recorded. But besides there is nothing either in the words in the Judge's judgment or in the used in the formal decree subsequently up, which necessarily shows that, under decree, Brijessuree was liable perso and not merely in her character of gua of the minor plaintiff, although it is that, as regards the stamp fees, it is sai the judgment that Brijessuree is to them.

The suit was by a minor, being bro on his behalf by his mother and gua Brijessuree. Whether Brijessuree was person chiefly moving in the matter or she was not the plaintiff in the suit. minor was the plaintiff. And if it intended by the decree to declare the m personally liable for costs, the declar should have been made in clear and un takeable language. It is not necessary us to say whether, under the circumst of this particular case, it would or not have been right to order that the should be paid by Brijessuree perso It frequently is right to make a gua or next friend liable for costs; but are also cases in which it is not prope hold him personally liable. Here the m obtained permission from the Court to as a pauper on behalf of her minor and it does not necessarily follow that, cause the suit was unsuccessful, she is, th fore, as a matter of course, and merely cause the suit is unsuccessful, to be ord personally to pay the costs.

The objection is a substantial and pr objection, because, as the decree in the o nal suit now stands, it is fairly open Brijessuree to contend that she is not p sonally liable under that decree. If decree had said distinctly that she personally liable, she might have appeal against it. Now that execution has iss under it against her, it is only fair th she should be allowed to urge that, by th decree alone, and not by any subsequen expression of opinion by the Judge, be position now must be ascertained.

The order for the issue of execution against Brijessuree personally is set aside. But we make no order as to costs.

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The 22nd May 1876.

Present:

he Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

n of Proof—Usufructuary Mortgage—Possession under Deed of Sale.

Case No. 707 of 1875.

al Appeal from a decision passed by Judge of East Burdwan, dated the th December 1874, affirming a decision of the Moonsiff of Kulwa, dated 7th May 1874.

unko Beharee Mookerjee and another (Plaintiffs), *Appellants,*

versus

itro Nath Paul (Defendant), *Respondent.*

oo Jadub Chunder Seal for Appellants.

No one for Respondent.

ere a person sought to recover some land, alleging had been leased out on a usufructuary mortgage, he other party claimed to have purchased the under a deed of sale; and the first Court accepted atter plea, on the back of the long possession lished by the defendant, while the second Court ated the question of possession from the deed of eyance, and though holding the deed to be unved, yet called on plaintiff to establish a usufrucy mortgage as against the actual possession proved he defendant, HELD that the second Court was g in separating the question of possession from eed under which it was alleged to have arisen, in calling on plaintiff to prove a usufructuary gage on the supposition tnat the deed of conance was not proved.

Markby, J.—THE plaintiffs in this case d to recover 2 beeghas and 10 cottahs land which they alleged were their estral rent-free land. They also alleged they had executed a usufructuary mortge-bond for eight years extending from year 1272 to the year 1279; and that r right to possession accrued at the iry of the mortgage in the last-named r.

The defendant's case was that he had rchased the land on the 14th Cheyt 1268 m the plaintiff, Bunko Beharee Mookerjee, o was then in possession of the land as oprietor.

The first Court found that the property as the property of Bunko Beharee, and at he conveyed it, as the defendant alleged, o the defendant in the year 1268, from hich time the defendant had been in ossession.

The Moonsiff states that "there is some discrepancy in the evidence of defendant's witnesses." But, in substance, his judgment is that from the defendant having been so long in possession he came to the conclusion that the case which the defendant set up was a true one. He further reverted to the fact that there was not an iota of evidence in support of the plaintiff's case, that the defendant came into possession under the mortgage-transaction.

In the second Court the case was dealt with in this way: The District Judge separates the title set up under the conveyance entirely from the question of possession. He examines the evidence in support of the conveyance given by the defendant very minutely, and in consequence of certain discrepancies in the evidence (probably the same discrepancies to which the Moonsiff adverted), he comes to the conclusion that the conveyance is not proved.

Then, dealing with the question of possession, he points out that only 11½ years' possession has been proved, and, therefore, not enough to create by itself a title; but upon the strength of that possession he calls upon the plaintiff to show that there was a mortgage in existence.

Now we do not think that that was the correct way of dealing with the case. If the defendant's case as to his conveyance had wholly failed, we are not prepared to say that the Court would have been justified in calling upon the plaintiff to prove the mortgage. But we think the error lay in separating the question of possession so entirely, as the Judge seems to have done, from the question of the genuineness of the kobala. We find this property is a very small one, the purchase-money in the kobala was only Rs. 36, and the value of the property, as laid now, is only Rs. 78. It was a transaction apparently conducted in the village, and probably by not very experienced persons. And we think that the right way to look at this case was to consider, when the plaintiff came in practically to impeach a document and possession which were 12 years old less one week, whether these discrepancies were not sufficiently accounted for by the condition in life of the parties, the circumstances under which the deed was executed, and the distance of time since the transaction took place. A great deal ought to be presumed in favour of the party who has been so long in possession. We think that, if the Judge had looked at the matter in that view, it is extremely doubtful whether he would have

come to the same conclusion. But, although we cannot accept the Judge's judgment as it stands, neither are we able, under the law, to reverse his judgment, and restore that of the Moonsiff. We can only set aside the judgment of the Lower Appellate Court, and remand the whole appeal for re-trial.

Costs will abide the result.

The 23rd May 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Interest on Time-expired Bond-debts—Damages for Non-payment of Money.

Case No. 20 of 1875.

Regular Appeal from a decision passed by the Judge of Beerbhoom, dated the 30th June 1874.

Joy Ram Gossamee (Plaintiff), *Appellant,*

versus

Nobin Chunder Doss and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboos Hem Chunder Banerjee and *Ooma Kalee Mookerjee* for Respondents.

Interest accruing after expiry of the term of a bond is in the nature of damages for non-payment of money, and it is in the discretion of Courts to fix the rate.

Markby, J.—As to the general mode in which the account is made up in this case there is no objection before us. The only objection before us is with respect to the interest which accrued after the due date of the first bond, namely, whether the Court below was bound to allow interest at the rate of 12 per cent., the rate fixed by the bond for the interest which accrued previously, or whether it had a discretion to reduce the rate, it being really of the nature of damages for non-payment of the money at the due date. The doubt that we had in the matter is removed by the case reported in 18 Weekly Reporter, page 322, where it appears that the same question was before the late Chief Justice and Mr. Justice Ainslie. And they held that interest in such a case is of the nature of damages, and that it is, therefore, in the discretion of the Court to allow what rate it thinks proper. I think I ought to follow this decision, in which Mr. Justice Mitter concurs, and the result is that the appeal will be dismissed with costs.

The 26th May 1876.

Present:

The Hon'ble A. G. Macpherson and G. Morris, *Judges.*

Determination of Future Rent—Mokurr Lease.

Case No. 120 of 1875.

Special Appeal from a decision passe the Judge of Tipperah, dated the August 1874, affirming a decision o Second Moonsiff of Soodharam, the 30th March 1874.

Asgur Ali and others (Defendants), *Appellants,*

versus

Wooma Kant Mookerjee (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboos Kalee Mohun Doss and *Byk Nath Doss* for Respondent.

A suit to determine not merely current but pro tive rates of rent will lie under the Rent Law pottah is not necessarily mokurruree, because it co a contingent holding on the lessee and his posteri

Morris, J.—The plaintiff, deeming tenure of the defendants liable to enhan ment of rent, served them with notice to from the beginning of the year 1281 certain enhanced rates specified, but, be an arrear is due, he brings this suit to h it declared that the defendants are liabl pay him rent at the rates specified in notice. This is, therefore, a suit for the de mination of the rate of rent which the fendants are liable to pay plaintiff in future. We have no doubt that under Rent Law a suit of this kind will lie. Re ing sections 28 and 29 with section we think that the suit for the determinati of the rates referred to in the latter se tion is a suit to determine, not merely current and existent rates of rent, but t rates which, upon notice served or otherwis the ryot may henceforth be liable to pay t his landlord. In the present suit the defend ants set up a certain pottah, and, in virtue o its terms, claim to be protected from enhance ment of rent. The first Court finds the pottah to be a forgery. On appeal the Lower Appellate Court, without arriving at any decision on this point, decides that it is not of a mokurruree character, and that its terms

t protect the defendants from liability hancement. The correctness of this has been disputed before us in special l, but, on full consideration, we are of on that the Judge is right. Not only the pottah not contain any such term okurruree in it, but it is expressly de-ed as a ryotee lease, and the interest of enant is limited by the condition that not to dig tanks or cut down trees. rent, no doubt, is entered at Rs. 18-1 per m, and under the lease the lessee and posterity are empowered to hold the But we think that this does no more confer a right in the tenant and his rity to hold the land so long as they harge the obligations which, as ryots, they bound to perform. The pottah is of nt date, and we have not, therefore, the ortunity of judging by the conduct of parties during a long course of years in t sense the lease was understood by m—whether as a mokurruree lease or rwise.

s to the objection taken to the rates of assessed by the Judge, we think that e is nothing in it, and we decline to fere.

he appeal is dismissed with costs.

The 26th May 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

tion of Landlord and Tenant—Determination of Tenancy.

Case No. 2828 of 1875.

cial Appeal from a decision passed by he Subordinate Judge of East Burdwan, dated the 31st July 1875, affirming decision of the Second Sudder Moonsiff f that District, dated the 23rd March 1875.

radhun Mudduck (Defendant), *Appellant,*

versus

Dinobundhoo Mojoomdar (Plaintiff), *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboo Jadub Chunder Seal for Respondent.

Where it is proved that one man has been the tenant another, it is necessary, before the former can be ejected, to show that the tenure has, in some way or other, come to an end; and the tenant cannot be said to have put an end to his relation with his landlord if, in order to save himself from ejectment, he, for a time, attorned to a third person who legally put himself in the place of landlord.

Markby, J.—The result of the argument in this case is that it is admitted that the defendant, who is the appellant before us, was in possession of this property as a tenant of the plaintiff, and the only way in which it is asserted that the tenure has been put an end to, is that the defendant himself has put an end to it by what is called his collusion with the other claimants to the same property. It appears that, while the appellant was in possession of the property as the tenant of the plaintiff, certain other claimants to the property took proceedings under what was then the law relating to these matters (section 318 of the old Criminal Procedure Code) and ejected him from the land. Upon that he does not appear to have communicated, in any way, with the respondent, who must now be taken to be the real landlord, but that he took a lease from those persons who had ejected him. Both the lower Courts have considered that this constitutes an abandonment of the appellant's tenure as held from the respondent. But we think that that is not a right view of the matter. He does not appear anywhere or in any manner to have denied the title of the plaintiff. All that he did was, when he found himself ejected from the land, to protect himself by taking a lease from the party who had ejected him. It is not proved in this case that he ever denied his liability to pay rent to the plaintiff-respondent. Therefore there has been nothing shown to us which will enable us to say that the tenure which the appellant held under the respondent has been put to an end. In this view of the matter, it is unnecessary to consider whether there was any evidence upon which it could be held that there was any other tenure subsequently granted by the respondent to the appellant. Even putting that subsequent grant entirely out of consideration, when it is admitted that the appellant was the tenant of the respondent, it is necessary to show that the tenure held by the appellant has, in some way or other, come to an end.

The result is that the decisions of both the lower Courts, in so far as they relate to the present appellant, will be reversed, and the suit as against him dismissed with costs.

The 27th May 1876.

Present:

The Hon'ble W. Ainslie and G. G. Morris, *Judges.*

Acquisition of Land for Public Purposes—Award under Land Acquisition Act.

Case No. 27 of 1876.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 9th September 1875.

Gour Ram Chunder (Petitioner), *Appellant,*

versus

Sonatun Doss and another (Objectors), *Respondents.*

Baboo Rajendro Nath Bose for Appellant.

Baboo Kumla Kant Sen for Respondents.

Where, in a suit for the recovery of the money awarded by Government for some land acquired for public purposes, the Judge, instead of deciding as between the parties in possession the money-value of their respective rights, determined as between the persons in possession and others whose claims had remained dormant until the acquisition of the land the relative strength of their titles, HELD that the order of the Judge was *ultra vires*, his duty under the Land Acquisition Act being to determine the money-value of ascertained interests, and not to try questions of title.

Ainslie, J.—THIS is a miscellaneous regular appeal from an order of the Judge of Sylhet made under the provisions of section 39, Act X. of 1870.

A certain sum of money has been awarded as compensation for property taken by Government for public purposes. The property formed a small part of a talook formerly belonging to one Hur Gobind, who died many years since, leaving a widow Koruna, who took a widow's estate in the talook, and on the 1st Cheyt 1272 (B. S.) sold it to the appellants, Sham Ram and others, on the allegation that she was compelled to alienate the talook to settle claims on the estate that she was bound to pay.

We are informed that Koruna died about three years ago. On the death of Koruna, Kisto Gobind became the heir to the estate (if any) of Hur Gobind; he took no steps to assert his rights against the purchasers who had been in actual possession from the date of their purchase. The date on which the proceedings of the Government for the acquisition of the land commenced does not appear in the record as sent to this Court, but on the 19th July 1875, corresponding to 8th Srabun 1282, the amount of com tion payable by Government was ascer Some three months before this, nam Bysack 1282, Kisto Gobind had ad interest, whatever it was, to Sonatun Lukhun for the trifling sum of Rs. 55.

These purchasers came forward to the amount fixed as compensation, and c quently a reference was made to the ju

The Judge found, as a fact, that Ram and others had long held posse undisturbed, but he overruled their and directed payment of the mon Sonatun and Lukhun, on the ground the latter represent the person to whom talook would come by inheritance unles conveyance by the widow is valid, an held that Sham Ram had failed to estab his title under that conveyance. In this proceeding under Act X. of 1870 had the effect, not of deciding, as betw parties in possession, the money-value their respective rights in the property ta from them by Government, but of de mining, as between the persons in posses and others whose claims up to the date the interference of Government with property had lain dormant, the question title to the estate out of which a small p tion has been taken under the Act.

Looking to the words of section 39, think the course adopted by the Judge wrong.

When there is a dispute as to the app tionment of the sum awarded as compen tion, however that sum may have been tled, the Judge is to decide the proportio in which the persons interested are entit to share in it.

His duty under this Act is to determi as between persons having ascertained int ests in the property represented by the co pensation awarded, the money-values of su interests. It is not his duty under this A to try questions of title between parti making conflicting claims to the property.

Section 15 provides for references to t Court in five cases; the second and fifth cases in which there is a doubt as to t title of the claimants; these cases are not be dealt with by the Collector at all; they a to be left to the Court, and are matte which, independently of the Act and of a interference of Government with the pr perty, are naturally the subjects of suits the Civil Courts.

It has been pointed out by the late learned Chief Justice, Sir R. Couch, "that there is no express provision in the Act for th

n of such questions." (Abdool Ali erner, 23 Weekly Reporter 73.) ordship goes on to say: "It would that they are questions to be decided he Court, but not by the Assessors; *the mode of doing this would appear by a suit in Court.* Mr. Justice on expressed his entire concurrence e judgment."

ng the same view we hold that, inas- as there was no suit in Court for the ination of the rights of the parties in ook, the order of the Judge was *ultra* nd must be, and the same is accord- et aside.

appellant will recover his costs from pondents.

allow Rs. 25 as vakeel's fees.

The 29th May 1876.

Present:

Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Putnee Talook.

Case No. 1178 of 1875.

Appeal from a decision passed by Subordinate Judge of Sylhet, dated th March 1875, reversing a decision he Moonsiff of Nubeegunge, dated th October 1874.

Nath Doss and another (Defendants), *Appellants,*

versus

Nath Surma (Plaintiff), *Respondent.*

boos Ashootosh Dhur and *Mohinee Mohun Roy* for Appellants.

oos Kalee Mohun Doss and *Aukhil Chunder Sen* for Respondent.

e a putnee talook had been sold for arrears of d certain persons, claiming to have been in on of the superior zemindaree rights in the estate, ght on a former occasion to set aside the sale, failed, and now renewed the attempt, HELD en if the claim of these persons to the zemin- ghts had been proved, which was not the case, uld not now repeat their old suit against the ar in a new form; still less could they, after always denied the existence of the putnee now claim in appeal to be its owners, if it

pherson, J.—WE think that the deci- f the Subordinate Judge in this case stantially right, and that this appeal be dismissed.

The plaintiff brings this suit to recover possession of certain specified lands in Mouzah Omurpore, which, he says, constitute a 3-anna share in a certain putnee talook which was purchased by his vendor, one Dol Gobind, on the 14th May 1867 or Joysht 1st, 1274, at auction-sale under Regulation VIII. of 1819 for arrears of rent due on account of the year 1273 at the instance of the zemindar, Shama Nund Surma. He is opposed by the principal defendants, Nos. 1, 2, and 3, on the ground that there is no such putnee talook as alleged; that, owing to a prior sale in 1265 to Gopinath Boidyo, their predecessor in title, by the zemindars Amanraza and Zamanraza, no proprietary interest in Mouzah Omurpore passed to Shama Nund Surma; and that, by the entry of their names in the Collector's register on the 15th October 1873 or Assin 30th, 1270, and by a separate account being opened with them under section 11, Act XI. of 1859, on the 28th April 1865 or Bysack 16th, 1272, and by their subsequent uninterrupted payment of the Government revenue, they have been recognized by the Collector, and have, in fact, been in uninterrupted possession of all the lands appertaining to the decennially-settled Mehal No. 31185 and to the halabadee Mehal No. 31196, which are situated within Mouzah Omurpore, and comprise the entire putnee talook set up by the plaintiff.

Both the lower Courts are agreed in finding that no such proprietary interest as is claimed by them in Mouzah Omurpore exists in the principal defendants. The Lower Appellate Court has further found that there was such a putnee talook within Mouzah Omurpore as is represented by the plaintiff. That it was sold for arrears of rent under the Putnee Law in 1867; that in 1868 a suit was brought by Kashinath Boidyo, the father of defendant No. 2, to set aside this sale; and to this suit the other principal defendants were parties, but the suit was dismissed; also that Dol Gobind obtained possession of the putnee talook under the auction-sale, and that the present plaintiff, as purchaser from Dol Gobind, likewise obtained possession of the lands which form the subject of this suit, and remained in the enjoyment of the same till he was ousted in Bysack 1278, as described in the plaint. The Lower Appellate Court accordingly gave a decree in favour of the plaintiff.

In special appeal two points have been prominently urged before us: *First*, that the sale of the putnee talook in 1867 was

invalid in law, inasmuch as Shama Nund Surma was not a proprietor within the meaning of section 8, clause 1, Regulation VIII. of 1819, who could bring the putnee talook to sale. He was only part-proprietor in the putnee talook, as he succeeded to the rights and interests of Amanraza and Zamanraza in the one estate No. 31185, and not in the estate No. 31196, and further he was not the recorded proprietor of these estates on the Collector's towjee. *Second*, that, even if it be held that the principal defendants have not established a proprietary interest in these two estates within Mouzah Omurpore, yet, inasmuch as their names have been recorded separately in the Collector's books in connection with this particular property, and they have uninterruptedly paid the Government revenue due on account of it since 1863, or, at any rate, 1865, they must be held to have discharged their putnee rent, and to have had no arrear due in respect of the year 1273 on account of which the putnee talook could have been lawfully put up to sale. Also that, inasmuch as the plaintiff has not shown that the other zemindars have paid the Government revenue amounting to Rs. 33-8 on this property, it must be taken that they, the zemindars, have acquiesced in the payment of this sum on account of it to the Collector by the principal defendants, and so recognized their position as putneedars.

But it is clear that neither of these arguments can have any force, because they are directed to show that the sale of the putnee talook in 1867 was invalid, and this matter has been already decided against these same parties in a separate suit. The defendants cannot be allowed now to repeat in another form the arguments which they urged in the suit No. 381 of 1868. Nor having, throughout this suit, maintained that there was no putnee talook, and that they held and occupied these lands as separately-recorded proprietors, can they be allowed to fall back upon the plea that, if not proprietors, they have throughout held the lands as putneedars, and duly paid the putnee rent for the same. The suit in its present shape is a suit brought virtually by the new putneedar under the auction-sale to oust the former putneedar who resists his retaining possession. If it be proved, as it has been proved, that the auction-sale under which the putnee talook was sold to Dol Gobind was a valid sale, then Dol Gobind and his vendee are in rightful possession of the putnee, and the latter can properly ask the Court to [illegible] to him the possession of which he [illegible] deprived by the tortuous acts of the defendants in 1278. The condition of [illegible] is not altered by the fact that, since [illegible] the principal defendants have assumed [illegible] status of zemindars in connection with [illegible] property, and have paid the Government revenue due on account of it. This [illegible] matter in respect to which there may [illegible] a question between the principal defendants and the other zemindars, but it is not [illegible] with which the rightful putneedar, *i.e.*, [illegible] present plaintiff, can have any concern. [illegible] result is that we dismiss the appeal [illegible] costs.

The 30th May 1876.

Present:

The Hon'ble A. G. Macpherson and G. [illegible] Morris, *Judges*.

Decree under s. 53, Act XX. of 1866.

Case No. 855 of 1875.

Special Appeal from a decision passed [illegible] the Second Subordinate Judge of [illegible] shahye, dated the 4th February [illegible] reversing a decision of the Moonsif [illegible] Bowaleah, dated the 17th August 1874.

Gunga Narain Chatterjee and another [illegible] of the Defendants), *Appellants*,

versus

Radha Krishna Dutt and others (Plaintiffs), *Respondents*.

Baboo Kishoree Mohun Roy for Appellants.

Baboo Taruck Nath Sen for Respondents.

A decree under s. 53 of Act XX. of 1866 has all the effect of a decree in a regular suit under the Code of Civil Procedure.

Macpherson, J.—A DECREE made under section 53 of Act XX. of 1866 has all the effect of a decree passed in a regular suit under the Code of Civil Procedure. As a decree, the Court may, under special circumstances, set aside the decree, and, if necessary, stay or set aside execution; but that must be done by proceeding under section [illegible]. The present plaintiffs did, in fact, proceed under section 55. and attempted to have the decree, which had been made against them under section 53, set aside on the ground of fraud; but the Court refused to set aside the decree or to stay execution. The matter

n finally disposed of, and cannot now pened.

decision of the Moonsiff was right, at of the Subordinate Judge wrong. ppeal is allowed ; the decree of the Appellate Court is reversed ; the decree Moonsiff is restored ; and the result the plaintiff's suit is dismissed with ts.

The 31st May 1876.

Present:

Hon'ble Sir Richard Garth, *Kt., Chief stice,* and the Hon'ble W. Ainslie, *udge.*

Compound Interest—Penalty.

Case No. 59 of 1875.

lar Appeal from a decision passed by e Subordinate Judge of Sarun, dated 23rd December 1874.

Land Mortgage Bank of India, Limited (Plaintiff), *Appellant,*

versus.

oo Soorjo Prokash Singh (Defendant), *Respondent.*

. R. T. Allan and *Baboo Kashee Kant Sen* for Appellant.

ssrs. *R. E. Twidale* and *H. E. Mendies* for Respondent.

ere a stipulation for compound interest is included ontract, the compound interest is not a penalty but tter of contract, and a Court enforcing the contract ecree should give the compound interest also.

arth, C.J.—We think that the Court w was wrong in not allowing compound est. The bond itself provided for it, there is no reason for supposing that it intended as a penalty. The covenant he bond is to this effect that, if the ey is not paid by the 29th of December , compound interest, to be calculated the half-yearly rents mentioned in the d, shall be charged from that date on the cipal sum lent. This is not a penalty, a matter of contract. The covenant ounts to this : that if, after the said date, h parties choose to go on—the debtor not ing the debt, and the creditor not enforc- the payment—the debtor shall pay com- nd interest upon the principal until it is —a not unusual stipulation in transactions bankers.

With regard to the costs as between attorney and client, we think there is no ground for such a claim. The bond provides that, if the mortgagor requires a re-conveyance of his property, he can obtain it only upon paying the principal and interest, and also the costs as between attorney and client. This stipulation is in the proviso for a re-conveyance, and does not form part of the covenant upon which this claim is founded.

We think that the interest at 6 per cent., which the Court below has allowed from the date of the commencement of the suit, is a very reasonable rate; but we consider that it should be charged upon the aggregate amount of principal and compound interest, which accrued due up to the date of suit.

We think that the appellant is entitled to the costs of this appeal.

The 31st May 1876.

Present :

The Hon'ble Sir Richard Garth, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Transfer of Decree—Attachment—Judgment-creditor's Claim.

Case No. 2324 of 1874.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 8th June 1874, affirming a decision of the Moonsiff of Hazeepore, dated the 31st July 1873.

Musst. Bibee Hosseina, for self and as mother and guardian of Mahomed Husheen Khan, minor (Plaintiff), *Appellant,*

versus

Jhamun Singh and others (Defendants), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Mr. Younan for Respondents.

Where an estate, which was subject to a mortgage, was attached in execution, but was leased out to fresh tenants and under-tenants between the attachment and the sale; and the case was transferred from the jurisdiction of one Court to that of another, in some way which was not apparent on the record; and the lower Court ruled that the transfer was irregular, and that the sale was void against the new lessees and under-lessees, HELD that the lower Court should have assumed that the sale-transfer was regular, and the sale good, and that all proceedings after the attachment were of no avail against the judgment-creditors.

Garth, C.J.—We think that the Lower Appellate Court has made a mistake here.

The bond of the 10th of August 1868 was one which might have been enforced as a mortgage-bond. But the plaintiff, the mortgagee, chose to sue upon it in the Court of Mozufferpore, and there a decree was made in his favour for the payment of the debt and interest. No decree was made for the actual sale of the property; but the decree contained a declaration which the Judge appears to have had no power to make, that the property should remain pledged as security for the debt. Consequently, the only portion of the decree which the plaintiffs could avail themselves of by execution was that which decreed to them the debt and costs.

The property which is the subject of suit lay in the District of Tajpore; and it appears that, by some process or other (it does not clearly appear what), the proceedings in the case found their way into the Court at Tajpore, from which Court an attachment was issued against the property; and subsequently a sale of it took place under the decree, and the plaintiffs became the purchasers.

Meanwhile, between the date of the attachment and the date of sale, this property appears to have been leased to some of the present defendants, and under-let again to other defendants.

The Moonsiff, in this state of things, decided that, because the plaintiffs were not in a position to prove the order by which the transfer of the proceedings was made from the one Court to the other (the usual form of which order would direct the execution of the decree in the District of Tajpore), the sale must be considered to have taken place without proper authority; and that it was, therefore, void as against the lessees and under-lessees, the defendants; and the Lower Appellate Court seems to have come to the same conclusion, notwithstanding that in the defendants' written statement this point with regard to the order was never raised.

Considering that the proceedings were, in fact, transferred into the Court of the Tajpore District, we think it should have been presumed that the course of transfer was regular; and that, at any rate, the defendants should not have been allowed to raise the objection, and that the Judge below should not have acted upon it as against the plaintiffs, seeing that it was not raised in the defendants' written statement or in the issues, and consequently that the plaintiffs had no opportunity of calling evide meet it.

We consider that, upon the evide duced at the trial, the Judge ought to held that the sale was good; and th the dealings with the property after attachment were of no avail as agai judgment-creditors.

We think, therefore, that the pl should succeed; and that it shou declared that they are entitled to the session of this property; and that the and sub-lease and all other dealings wi property subsequent to the attachme null and void as against the plaintiffs.

The plaintiffs will have their costs i the Courts.

The 2nd June 1876.

Present:

The Hon'ble E. G. Birch and G. G. M *Judges.*

Review of Judgment—Special Appeal.

Case No. 2722 of 1875.

Special Appeal from a decision pass the Subordinate Judge of Sylhet, the 28th August 1875, reversing a sion of the Officiating First Moons Lushkerpore, dated the 29th March 18

Chunder Churn Auggrodany (one of Defendants), *Appellant,*

versus

Loodunram Deb (Plaintiff), *Respondent.*

Baboo Bharut Chunder Dutt for Appellant.

Baboo Bykunt Nath Doss for Respond

It is not a proper ground for granting a revi judgment that a Judge, by going through the evi a second time, might arrive at a different conclusion; where a review has been granted without proper gr the High Court, on special appeal, can set aside order, and restore the former judgment.

Birch, J.—In this case the first objec taken in special appeal is that there has b an error of procedure in granting the revi which has affected the decision of the c on the merits, inasmuch as the points rai in review had already been raised and det mined at the original hearing of the appeal.

It appears that the case first came befo the same Subordinate Judge in appeal, an on the 23rd June 1875, he recorded a judg ment after considering all the evidence in

the case, and dismissed the appeal affirming the Moonsiff's decision. That judgment commences in these words: "The plaintiff has "not come into Court in good faith; he has "put in a map, but he has not marked "therein the place to which he says the path "in question leads." On the 28th June, that is, five days after he passed this judgment, the Subordinate Judge records a proceeding wherein he states that perhaps a different conclusion might have been arrived at, if an Ameen had been sent to the spot. This proceeding concludes with these words: "However, as he (the plaintiff) has applied "for a review of judgment, I should once "again go into the evidence on the record." The Subordinate Judge accordingly ordered that notice should be issued to the opposite party to show cause why the application for review should not be granted. On the 4th August 1875, the Subordinate Judge recorded the following judgment: "I will again go into all the evidence in this case. I think I made a mistake. I was wrong in saying that the place which the plaintiff says the path leads to does not exist, inasmuch as that place does not form the subject of this case," and then he ordered that the application for review be allowed, and the case be restored to its original number.

It is difficult to understand this order of the Subordinate Judge. In it he attributes to himself a statement which, so far as we can see, he had never made in his first judgment. One thing is quite clear to us that no admissible grounds are assigned in the application for review, and the only reason for which the Subordinate Judge seems to have granted it is that, if he went through the evidence again, he might possibly come to a different conclusion. This is not a proper ground for a review. It has been frequently held by this Court that, if it appear in special appeal that no grounds have been shown on which a review could be granted, this Court can interfere, and restore the judgment which had been passed when the appeal was originally heard.

As to the contention that, under section 378 of the Civil Procedure Code, we cannot entertain this objection in special appeal, it is sufficient to refer to the Full Bench decision reported in 20 Weekly Reporter, page 84, where that point is set at rest. This point was also raised in a case reported in 23 Weekly Reporter, page 438, and the objection was, in that case, also overruled upon the authority of the Full Bench case. We think that the Subordinate Judge went beyond the provisions of the law in admitting the review in this case. We accordingly reverse his judgment of the 28th August 1875, and restore that of the 23rd June 1875. The appeal is decreed with costs.

The 5th June 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Remand—Error in Law.

*Appeal under section 15 of the Letters Patent from a decision passed by the Hon'ble E. G. Birch, one of the Judges of the Court, dated the 3rd March 1876, in Special Appeal No. 1171 of 1875.**

Hurish Chunder Shaha (Plaintiff), *Appellant*,

versus

Hurish Chunder Paul (Defendant), *Respondent*.

Baboo Bungshee Dhur Sen for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

To justify a remand it must be shown that the lower Court has committed some error in law, or that the case comes, in some other way, within the terms of s. 372, Civil Procedure Code.

Garth, C. J.—We think that this appeal should be allowed. We quite agree with

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* The 3rd March 1876.

Present:

The Hon'ble E. G. Birch, *Judge*.

Case No. 1171 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 15th March 1875, modifying a decision of the Moonsiff of Pubna, dated the 21st November 1874.

Hurish Chunder Paul and others (Defendants), *Appellants*,

versus

Hurish Chunder Shaha (Plaintiff), *Respondent*.

Baboo Issur Chunder Chuckerbutty for Appellants.

Baboo Bungshee Dhur Sen for Respondent.

This case has occupied the time of the Court to an extent quite disproportionate to the importance of the suit, and this is attributable to the extremely-confused judgment which the Subordinate Judge has recorded. After carefully hearing all that has been urged on either side, I am of opinion that the decision recorded should not be allowed to remain as the final decision in

Mr. Justice Birch in thinking that the judgment of the Lower Appellate Court is very inartistically drawn, and that it is in many respects confused and unsatisfactory; but, in order to justify a remand, it must be shown that the Lower Appellate Court has committed some error in law, or that the case comes in some other way within the terms of section 372 of the Code of Civil Procedure; and, although we have had the advantage of hearing the respondent's pleader at some length, he has failed to satisfy us that the Lower Appellate Court has committed any error in law or procedure which would bring the case within the provisions of that section. Everything that he has pointed out resolves itself into a misapprehension of fact on the part of the Judge, and this, of course, is no good ground for special appeal.

With regard to the Judge's observations as to the dakhilas, it is not easy to understand what he means. But it is clear that he has gone into the whole question in a very careful manner; and, although he may not have enunciated his views up[on] subject in as correct and clear a way [as] might, he evidently appears to have [come] to the conclusion that, whatever might [have] been the state of things previous to [that] some change took place in the defen[dants'] tenancy after that time, and that the [dak]hilas which have been produced subse[quent] to 1270 do not relate to the same prope[rty] that in dispute.

Then, with regard to the other [point] which was taken, namely, that the p[ersons] whose names are mentioned in the da[khilas] were not proved to have been the office[rs of] Bejoy Govind Chowdhry, that fact ap[peared] to have been admitted in the lower C[ourt]. The Judge says that the respondent's pl[eader] could not deny it, and he must take wh[at he] so says to be true. Admissions of this [kind] are not unfrequently made in all stages [of a] case, and especially in the earlier st[ages] and having been made there, and acted [upon] by the Lower Appellate Court, they ca[nnot] more be questioned afterwards than ma[ny things] which have been evidenced by actual p[roof].

The judgment of Mr. Justice Birch [must] be reversed, and the special appeal wi[ll be] dismissed. The appellant will have his c[osts] of both the hearings in this Court.

The 8th June 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glo[ver], *Judges.*

Irregularity in Notice of Sale—Name of wr[ong] Pergunnah—Inadequacy of Price.

Case No. 371 of 1875.

Miscellaneous Appeal from an order pa[ssed] by the Subordinate Judge of Gya, d[ated] the 12th August 1875.

Nooral Hossein (Judgment-debtor), *Appellant,*

versus

Ram Coomar Sahee and others (Decree-holders), *Respondents.*

Baboo Boodh Sen Singh for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

Mere inadequacy of price is not a sufficient ground [for] setting aside a sale in execution if no substantial inju[ry] has been caused to judgment-debtor by any mate[rial] irregularity in publishing and conducting the sale; a[nd] the mention of the name of a wrong pergunnah in th[e] notice of sale is not such an irregularity when th[e]

a suit of this nature. Small as the amount in suit may be, its proper decision may be a matter of great importance to the plaintiff and the defendant.

The Moonsiff came to a distinct finding upon the issues which he had recorded. Those issues were, whether the land was part of the plaintiff's or of the defendants' tenure; whether the plaintiff had obtained possession, and had been dispossessed; and whether the defendants were in possession for upwards of twelve years or not. The Moonsiff came to the conclusion that the defendant had satisfactorily proved that he and Hullodhur were in possession for more than twelve years. As Hullodhur disclaimed any title to the land in dispute, the Moonsiff gave the plaintiff a decree for the half share formerly held by him. As regards the other half he found that the plaintiff was not entitled to obtain possession. The Moonsiff also found that the plaintiff had never obtained possession or been dispossessed.

Upon the case coming before the Subordinate Judge, he appears to have lost sight of the issues which were required to be tried in this case, and, as far as I can understand his judgment (for I confess that I am not even now able to understand what he means), he starts with the impression that what he has to try in this case is whether the plaintiff's pottah is a genuine one or not. But nowhere, as far as I can discover, has he come to a distinct finding as to whether the plaintiff obtained possession or not, and was dispossessed by the defendant. The Subordinate Judge does not distinctly find whether the defendants have held, as they allege, for a period which would prevent the zemindar or the plaintiff who claims through the zemindar from obtaining possession of the land.

As I consider it necessary to remand the case, I forbear from making any comment upon the portions of the judgment of the Appellate Court which appear to me inconsistent with the evidence. Suffice it to say that the case has not, in my opinion, been properly tried by the Appellate Court, and it must be remanded for a proper trial; but, with reference to the remarks I have made above, I do not think it right to send the case back to the Subordinate Judge, and I, therefore, direct the Judge to put this appeal upon his own file, and try it himself. The costs will abide the result.

notice has been served in the right mouzah, and the estate has been identified.

Kemp, J.—THE judgment-debtor is the appellant in this case.

Two mouzahs were sold in satisfaction of a decree against him. As to one of them, Nussurpore, the sale has been set aside, and there has been no appeal against that order.

With reference to the other Mouzah Dhorebaree, the objections of the judgment-debtor were overruled by the Subordinate Judge, and the sale upheld.

Under section 256 of the Civil Procedure Code there must be material irregularity in publishing or conducting the sale, and the sale cannot be set aside except on the ground that such irregularity has caused substantial injury to the judgment-debtor. Now, the only irregularity in publishing the sale was that the wrong *pergunnah* was given. There is no doubt that the proclamation was served in the right mouzah, and the pergunnah was described by the decree-holder according to the petition of the judgment-debtor himself, the said petition being dated the 18th of August 1873. We therefore think with the Subordinate Judge that there was no material irregularity in publishing the sale.

Then, as to the irregularity in conducting the sale, it is said that the Nazir who was deputed to sell, having postponed the sale of Mouzah Dhorebaree, commenced the sale of some other mouzah and completed it, and that it was late in the evening when he put this mouzah up to sale, when the purchasers had gone away, and that, therefore, the price was inadequate. Now, mere inadequacy of price, unless it be shown that substantial injury has been occasioned to the judgment-debtor by material irregularity in publishing or conducting the sale, would not alone be a sufficient ground for reversal of the sale. From the evidence of the Nazir, and we see no reason to discredit his evidence, it appears that the sale was conducted in a regular manner. The price is *primâ facie* inadequate; but it has been shown to us that this mouzah is held in *dur-mokurruree*, and that the income of it received at present by the judgment-debtor is only 52 rupees per annum. But, be that as it may, inadequacy of price, unless substantial injury has been sustained by the judgment-debtor by material irregularity in publishing and conducting the sale, would not alone, as already said, be a sufficient ground for setting it aside.

We therefore dismiss the appeal with costs. Vakeel's fee, two gold mohurs.

The 8th June 1876.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mesne-profits.

Case No. 33 of 1876.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Sarun, dated the 8th February 1876.

Ram Roop Singh (Judgment-debtor), *Appellant,*

versus

Sheo Golam Singh (Decree-holder), *Respondent.*

Baboo Doorgadoss Dutt for Appellant.

No one for Respondent.

When a decree does not give mesne-profits, mesne-profits cannot be given in execution of the decree, but a regular suit may be brought for recovery thereof.

Glover, J.—THE appellant, who is the judgment-debtor, brought a suit for possession of land under a mortgage, and the present decree-holder intervened.

The first Court gave the plaintiff a decree.

The High Court on appeal reversed that order, declaring that the respondent, the present decree-holder, ought to have had notice, and, not having had notice, that the plaintiff's suit was bad, and should be dismissed.

In the *interim*, however, the plaintiff, the present judgment-debtor, had taken possession of the land under his decree; when ousted by the decree of the High Court, the defendant, respondent, put in a claim for mesne-profits during the time the plaintiff was improperly in possession.

It is now urged in appeal, and there seems to be no doubt so far as the law is concerned, that the contention is right; that, as the High Court's decree passed no order for *wassilat*, the decree-holder is not entitled to get it in execution of that decree; and that, if he wants it, he must bring a regular suit for the purpose. In the case of Hurro Chunder Chowdhry against Sooradhonee Debia, reported in 1 Weekly Reporter, page 5, Miscellaneous Rulings, the same point was raised and decided in the same manner. There seems to be no doubt that the decree-holder, having got no decree empowering him to realize mesne-profits, was not justified in

taking out execution for the recovery thereof. If he desires to have them, he must bring a regular suit.

This appeal is allowed, and the order of the Subordinate Judge reversed, but, under the circumstances, without costs.

The 9th June 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution-sale — Indefinite Postponement — Irregularity in Sale.

Case No. 20 of 1876.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Shahabad, dated the 7th December 1875.

Jhoomuck Chowdhry (Judgment-debtor), *Appellant,*

versus

Rajah Radha Pershad Singh and another (Decree-holders), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboos Juggadanund Mookerjee and *Chunder Madhub Ghose* and *Moonshee Mahomed Yusuf* for Respondents.

Where a sale in execution does not take place on the date fixed in the original notice, an indefinite postponement cannot be regarded as an adjournment from day to day, and a fresh notice should fix another date for the sale; and where, in consequence of an indefinite postponement, an estate has been purchased for an inadequate price, and especially by the judgment-creditor, the irregularity is one that has occasioned substantial injury, and justifies a setting aside of the sale.

Kemp, J.—The judgment-debtor is the appellant in this case The decree in execution of which the sale took place is dated the 16th of December 1872; and the last application for execution of that decree was made after very nearly three years had elapsed from the date thereof, that is to say, on the 30th of June 1875. The date fixed for the sale was the 8th of November 1875. It appears that the judgment-debtor, on the 6th of November, informed the Co he was trying to raise money on the p either by sale or mortgage, and a a postponement. The Subordinate refused to postpone the sale on the that the judgment-debtor had not this allegation, and that the decree had no opportunity of meeting it. Th the 8th of November, the day appoin the sale, the judgment-debtor represe the Court that purchasers had not co in Arrah, the words used being "*Arra kharidar jama na hua*", or in other that a reasonably sufficient number of p sers to ensure a fair price being bid f property in the Mofussil had not collec the town; and he asked the Court t the sale in the Mofussil instead of sudder station. The Court, thereupon, p an order that the sale should be held Mofussil on the 10th of November that the judgment-debtor should for deposit the *tullubana* and the tra expenses of the Nazir, otherwise th property should be put up for sale. clear that the judgment-debtor did n posit the *tullubana;* but the sale, i of taking place on either the 8th or 1 November, took place on an interm date, namely, the 9th of November. two houses and the two gardens were chased by the decree-holder, and the *by waffa* document was purchased by the harajah of Doomraon.

The judgment-debtor now appeals Court mainly on the ground that th has been held upon a day not fixed b Court; and that he has been substa injured by this procedure of the Co that the property which he estimates worth 25,000 rupees has been sold inadequate sum.

Now, we propose in this case to the principle laid down in the decisi the late Chief Justice, Sir Barnes Pea in the case to be found in 3 Weekl porter, page 11, Miscellaneous Rulings, that case there was a difference of op between Mr. Justice Loch and Mr. Ju Seton-Karr as to whether it was nece when a sale is indefinitely postponed, to a fresh proclamation of the date of The learned Judges having differed in nion—Mr. Justice Loch being of opi that it was necessary, and Mr. Justice Se Karr that it was not—the case was ref to a third Judge, and was taken up by learned Chief Justice. The remarks in judgment, which are applicable to this c

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are as follows: "It is always necessary to "watch with jealousy sales made in execu- "tion of decrees, especially when it appears "that the property has been sold much "below its value, and that the execution- "creditor is the purchaser. If, in such a "case, the formalities which the law requires "to ensure, as far as possible, a sale at a fair "value have not been gone through, is it "unreasonable to set aside the sale and re- "quire a fresh sale to take place?" Then follow remarks which apply to the judgment-creditor in this case: "If the execution- "creditor has not purchased at too low a price, "he will not be damnified by having the "estate again put up to auction."

Now, in this case it is very clear that the property was not sold on the day fixed for its sale. Under section 249 of the Code of Civil Procedure, in all cases of intended sale by public auction, whether of moveable or immoveable property, the Court *shall* fix the time and place for the sale. The time fixed for the sale was the 8th of November. The sale, as a matter of fact, took place on the 9th of November. The Subordinate Judge says that he looks upon this case as one of postponement of sale from day to day, and not one of indefinite postponement, which, under the ruling in 3 Weekly Reporter already referred to, would require a fresh issue of notice. We do not take that view of the case. It appears to us that whether or not there was a sufficient number of purchasers collected in the town of Arrah on the 8th of November, the day originally fixed for the sale, it is but reasonable to suppose that those purchasers, when they heard that the sale was to take place in the Mofussil on the 10th, left the town. The sale which took place on the 9th, therefore, being not on the day fixed for sale, and not being, in our opinion, postponed from day to day, we think that it was necessary, as the sale was held on a different day to that originally fixed, to issue a fresh notice. We also think, with reference to the price paid for the properties sold in execution, that the judgment-debtor has been substantially injured by the irregularity in the procedure of the Court in conducting the sale. We therefore reverse the sale, and, under section 258 of the Civil Procedure Code, direct the purchase-money to be returned to the purchaser with interest at the rate of six per cent. per annum. We also think, looking to the conduct of the judgment-debtor in this case, that he ought to pay the costs of this appeal. Vakeel's fees, two gold mohurs

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The 4th April 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, the Hon'ble F. B. Kemp, L. S. Jackson, A. G. Macpherson, and W. Markby, *Judges*.

Ejectment—Reasonable Notice to quit—Determination of Tenancy.

Special Appeal No. 3205 of 1874 from a decision passed by the Subordinate Judge of Nuddea, dated the 22nd September 1874, affirming a decree of the Moonsiff of Kooshtea, dated the 30th May 1873.

Rajendronath Mookerjee (Defendant), *Appellant*,

versus

Raseedur Ruhoman Khundkar and another (Plaintiffs), *Respondents*.

Baboo Bama Churn Bonerjee for Appellant.

Moulvie Murhumut Hossein for Respondents.

A suit for ejectment brought by the landlord against a cultivating ryot, whose tenancy can only be determined by reasonable notice to quit at the end of the year, is liable to dismissal on the plea of want of such notice.

PLAINTIFFS brought this suit to recover possession of the disputed plot of land, alleging that the same had been held by them in *jamai* right for a long time, under a pottah dated 1260 B. S.; that they had been forcibly dispossessed therefrom by the landlord in 1279, who let it out to the new tenant, defendant. The plea set up was, that the plaintiffs had verbally relinquished the *jote*, and that thereupon it was let to the new tenant. The Moonsiff decreed the claim of the plaintiffs on the ground that the relinquishment set up by the defendant was not proved. Upon appeal, the Subordinate Judge upheld the Moonsiff's decree, holding that, when the defendant has failed to prove the plea of relinquishment, it was not for the plaintiffs to establish their *jamai* right, which was impliedly admitted by the defendant, and that, therefore, the plaintiffs were entitled to a decree.

In special appeal, it was contended that the plaintiffs being out of possession ought to have proved the subsistence of their *jamai* right; that the mere failure of the defendant to establish relinquishment does not and cannot of itself entitle the plaintiffs to a decree.

The appeal being below rupees fifty in value came on for hearing before Markby, J., sitting alone, who referred to a Full Bench the question "whether a ryot, whose tenancy can only be determined by a reasonable notice to quit expiring at the end of the year, can claim to have a suit brought against him by the landlord dismissed on the ground that he has had no such notice, or whether in such a case the Court ought to give a decree in favour of the landlord, fixing a date for giving up possession, which shall be fair towards the tenant."

Reference order.

Markby, J.—The facts of this case may be very shortly stated: The plaintiff was a cultivating ryot, not having (as far as app any right of occupancy, and not holding any specified term. In Jeyt 1279, his l lord, without giving him any notice at all, in a fresh tenant. In Pous 1279 the pl brought this suit to recover possession. zemindar, who, together with the in-co tenant, defended the suit, alleged that plaintiff had relinquished his tenure in 1 Both Courts have found that there was relinquishment, and have given the pl a decree.

In special appeal it is contended that plaintiff had no title upon which he co recover possession, of course, as against one but his own landlord. It is clear that plaintiff had a title to recover possessi and even as against his own landlord, should have thought that the plaintiff co have recovered possession. It is, I th clear upon the authorities that he could have been ejected without reasonable not and then only at the end of the year (W. R. 33; 28 W. R. 548). And unless tenancy has been put an end to by t present litigation, it is still subsisting.

This last point is the one upon which doubt arises in consequence of a decision ported in 22 W. R. 440. There the lear Judges, whilst recognizing the right of t tenant to a reasonable notice to quit expiri at the end of the year, seem nevertheless consider that the institution of a suit is it sufficient demand of possession for the p pose of maintaining the suit, and that t tenant's claim for a reasonable notice exp ing at the end of the year will be satisfi by fixing such a date for giving up possessio as will be fair towards himself.

If that be so, I do not think the plaintiff in the present case could recover possession; he would only be entitled to some compensation for having been ejected too soon.

But, with very great deference, I cannot bring myself to think that the decision I

have referred to is correct. I do not see how the landlord, who has not determined the tenancy by a proper notice, can recover in ejectment. Even in the case of a tenancy-at-will, it is necessary under English Law that the will should be determined (Doe *versus* Phillips, 10 Q. B. 130), where it was argued that the will was determined by bringing the action; but the Court held that it was not so. The case of a ryot whose tenancy can only be determined at the end of the year by a reasonable notice to quit is a much stronger one.

It seems to me impossible to consider such a ryot otherwise than as a tenant from year to year. I do not say that the incidents of the tenancy are precisely the same as those of a yearly tenancy in England, but I cannot think that the ryot can be ejected without a proper notice to quit.

The case in the 23rd W. R., p. 449, is based upon the decision in the 20 W. R. 401; but I am strongly disposed to think that the learned Judges did not there intend to lay down any proposition of law at all.

I think that decision only carries out a suggestion made by the Court for the benefit of the parties, and in order to avoid further litigation.

The question being one of great importance, I feel myself justified in referring to the Full Bench the question whether a ryot, whose tenancy can only be determined by a reasonable notice to quit expiring at the end of the year, can claim to have a suit brought against him by his landlord dismissed on the ground that he has had no such notice, or whether, in such a case, the Court ought to give a decree in favour of the landlord, fixing a date for giving up possession, which shall be fair towards the tenant.

The opinion of the Full Bench was delivered on 14th August 1876.

Garth, C.J.—We are of opinion that, in the case of a ryot of the class specified in the question referred to us, *i.e.*, a ryot whose tenancy can only be determined by a reasonable notice to quit expiring at the end of the year, the ryot can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has had no such notices.

The 6th April 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Effect of new Kubooleut on twenty years' occupation.

Case No. 1369 of 1875.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 6th May 1875, reversing a decision of the First Moonsiff of Diamond Harbour, dated the 2nd December 1874.

Soorjomonee Dossee, grandmother and guardian of Ram Ruttun Napit, minor (Defendant), *Appellant,*

versus

Peareemohun Mookerjee, guardian and manager of Rashbeharee Mookerjee and another, minors (Plaintiff), *Respondent.*

Baboo Doorga Ram Bose for Appellant.

Baboo Ashootosh Mookerjee for Respondent.

The presumption arising in favour of tenant from a twenty years' occupation, when it is supported by evidence, is not necessarily displaced by the discovery of a kubooleut bearing a subsequent date. Such a kubooleut is as consistent with the confirmation of a pre-existing rent as with the settlement of a new rate, and it is for the Court to balance the inferences drawn from the kubooleut against those arising from the twenty years' holding.

Jackson, J.—It appears to us that the Lower Appellate Court ought not to have held that the presumption in the defendant's favour arising from his having held for more than twenty years at an unchanged rate is rebutted by the existence of a subsequent engagement, being a kubooleut for the year 1245. The terms of the kubooleut merely are, with certain customary stipulations, that, after measurement, the rent of the tenant has been ascertained to be so much, and he thereupon promises to pay by certain instalments, and he no doubt does agree that the covenant shall have no effect unless approved by the Board of Revenue. If the presumption in favour of the defendant were of a less positive and forcible kind, it might be that the Judge would be at liberty to balance the inferences which could be drawn from the kubooleut against those arising from the twenty years' payment; but the law saying that the very payment for twenty years raises a presumption of holding at an unchanged rent from the time of the Permanent Settlement unless the contrary be proved, that presumption is only displaced by positive proof to the contrary, and, we think and we observe, it has been held by another of our colleagues that such a kubooleut as that relied upon by the plaintiff in this case is as much consistent with the confirmation of a pre-existing rent as with the settlement of a new rent. We are, in fact, inclined to think that the kubooleut only ratified and continued the rent previously paid. Under these circumstances, the presumption arising in favour of the defendant was not displaced, and the plaintiff, therefore, was not entitled to the declaration that he has obtained. The judgment of the Lower Appellate Court will be accordingly reversed with costs. This judgment will apply to appeals Nos. 1370 and 1372.

The 25th April 1876.

Present:

The Hon'ble Louis S. Jackson and W. McDonell, *Judges.*

Professional Fees—Extra-professional Fe Quality of Barrister.

Case No. 293 of 1874.

Regular Appeal from a decision passed the Recorder of Rangoon, dated 23rd July 1874.

The Land Mortgage Bank of India, Lim (Plaintiffs), *Appellants,*

versus

John James Elmes (Defendant), *Respondent.*

The Advocate-General and *Messrs. W. Jack* and *Morgan* for Appellants.

Messrs. Macrae and *Remfry* for Respondent.

Where a barrister renders services which go beyo his profession as a barrister, his incapacity to reco fees as a barrister does not extend to such extra-prof sional services; and where, as in Burmah, the l enables an advocate to recover fees, and a barrister a both as an advocate and in other capacities, the re neration claimed by him ought to be divided into t parts, and while, in that part of his services in which acts as attorney, he should be allowed to recover fo not much in excess of those allowed in Calcutta, attorney's charges whatever should be allowed for th part of his services which are extra-professional; th commission, or other allowance made for such service being the only proper and a full remuneration for these

Jackson, J.—The questions which we have had to consider in this appeal are substantially two: *first*, Is the defendant, Mr. Elmes, as a barrister-at-law, debarred from claiming remuneration for services professional and extra-professional rendered by him, or from

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pleading and setting off a debt due to him on account of such services? and, *second*, Is the remuneration which he demands in this case, and which, in large reduction of his original claim, the Court below has awarded him, excessive and unreasonable?

Upon the first of these questions, it is to be observed, that, although Mr. Elmes describes himself at the head of his bill of costs and elsewhere as barrister-at-law, he was, in fact, employed as advocate of the Rangoon Court, law agent, and general man of business. In Rangoon, as the learned Recorder informs us, an "advocate" ordinarily and necessarily combines the functions of counsel and attorney, there being no attorneys in British Burmah; and the business entrusted to Mr. Elmes went far beyond the business of a legal practitioner, comprising the negotiation of contracts of sale and lease, interviews with the revenue officers of Government, employment and payment of engineers and surveyors, and so forth. In respect of these various services, Mr. Elmes (having a considerable sum of money belonging to the plaintiffs in his hands) exhibited a bill of charges amounting (inclusive of commission) to Rs. 5,865-6 annas, out of which charges amounting in the aggregate to Rs. 2,218 have been disallowed by the Court below. Out of the balance of about Rs. 3,647, no less than Rs. 2,250 are two lump sums payable as commission on the letting and selling of the property in respect of which Mr. Elmes had been connected, and Rs. 25 more are his commission on the sale of a boiler. It is a little difficult to see how Mr. Elmes's quality of barrister-at-law precludes him from recovering these amounts if he has earned them.

Upon the question of law, we have been referred to these authorities—Kennedy *vs.* Brown, 13 Scott, C. B., Krishna Rao *vs.* Mutu Kishen, 4 Mad. 244, and Shumsoonnissa Begum *vs.* Carrapiet, Bonhier's 316. The first of these cases commands our fullest respect, and the other two have our entire concurrence; but not one of the three is precisely in point. It appears to us to result from the two first-mentioned authorities that to produce the incapacity spoken of there must be the profession of barrister or advocate, coupled with the right of advocacy in the particular Court and the business of advocacy, as the subject-matter. In the third case, so far as it bears on the matter now under consideration, it was decided that the officer of the Court, an attorney, clothed with the character and deriving benefit from his position as such, could not shake off his responsibility by undertaking business just beyond the local jurisdiction. In the observations made by Jackson, J., and by Colvile, C.J., we heartily agree; but, in the present case, Mr. Elmes was acting both within the jurisdiction and in a capacity in which it seems not unusual to employ law agents or advocates in British Burmah. Except in one respect, to which we shall advert presently, it seems to us that Mr. Elmes styled himself barrister-at-law just as he might have styled himself LL.D., if he had happened to take that degree. We think, therefore, that Mr. Elmes is not precluded by his quality of barrister from setting up any debt which may be due to him by the plaintiffs.

The next question, and one of some embarrassment to us, is, whether the charges which are actually made are such as the Court ought to sanction on the part of one of its officers as Mr. Elmes undoubtedly was, though the nature of his business was very comprehensive. The Burmah Courts Act, 1872, in section 59, provided that the fees to be received by any advocate should, at all times, be subject to the control and taxation of the Recorder, and that no fees should be recoverable by any advocate, unless they

should have been allowed after taxation. This provision indeed clearly points to the advocate's capacity to sue for his fees, or claim them as a debt, and Mr. Elmes appears to us to have been merely an advocate admitted to practice upon his qualification as a barrister. It has not been shown to us that any rules or scale of fees had ever been prescribed, which appears to us a fact much to be regretted, nor that any of the fees claimed in this case (and some of them are undoubtedly fees proper to litigated business) had been taxed.

The recent Act XVII. of 1875 more particularly provides (Chapter VII, section 90) for the making of rules regulating the fees payable to practitioners and the control and taxation of costs; and it is to be hoped that time has not been lost in making salutary provision for the protection of suitors.

We have said that we find ourselves embarrassed in dealing with this question by the novelty of the case and by the want of such local information as is necessarily possessed by the local tribunals. If we could discover the principle on which the learned Recorder has proceeded in allowing or disallowing charges, and that principle was reasonable, we should not think it right to interfere on appeal in a matter so much within the discretion of his Court; but that principle is not apparent to us, and we consider that, even after the deductions made, there are still charges, such as the Court below ought not to have sanctioned on the part of its officer. These we shall very shortly state; but, before doing so, we will refer again to an observation made at the hearing of the appeal to which, at the time, no satisfactory answer was given. It was asked why, during all the time when these transactions were pending, the Land Mortgage Bank had made no inquiry as to Mr. Elmes's terms. It now seems to us that some answer to this objection may be found in the fact of Mr. Elmes's describing himself as ba at-law. He was manifestly not acting strict line of duty of a barrister, and of the work which he undertook was, have already observed, quite beyond legal province. The only significance, fore, which it was possible to attach using that title was, that it held o assurance that in his dealings he me observe that fairness and honourable tion to professional rule which charac the Bar, and his instructions having conveyed to him by a firm of attorne Calcutta, they may have considered th charges would be regulated by the p sional custom with which they were co sant.

This being said, the principle which think should be adopted is this: Mr. El remuneration should be divided into parts, corresponding with his legal and e legal employment; and in that part of legal employment, in which he acted m as attorney, he should recover charges very much in excess of those which attorney here would receive, and that in extra-legal part, there should be no attor charges whatever allowed. If it be that this is the principle which the lea Recorder intended to lay down in the pas which we read from page 13 of the P book, *viz.*: "In dealing with the defend "bill, I have, therefore, to see what cha "relate exclusively to the legal work, "award a fair and reasonable remuner "for it; and what, if any, are made "services which have reference to the "of the property alone, and entirely disa "them, as the commission charged is "only remuneration he is entitled to "them," then we are bound to say that it not laid down with sufficient precision, n carried out with sufficient strictness. Appl ing the principle stated to items 6, 13, 3 44, 47, 49, 52, 54, 56, 59, 62, and 64 of t

costs (as shown in the margin), reductions. Rs. 289 more are struck out, and a very rigid application would probably bring about a still further reduction.

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We think the plaintiffs might very fairly demur to being asked to accept the award of the three men referred to, who, though doubtless able men, were all members of the profession as the defendant and obvious- rested in maintaining the very high s to which the plaintiffs objected.

to the rate of commission which was tized as exorbitant by the learned ate-General, we observe that this on does not seem to have been raised Court below, and that the rate is ntly approved by the learned Recorder. as also observed that there was nothing w that defendant had brought vendor urchaser together; but, seeing that ffs had no other representative on the we think no doubt can arise as to that, is so found by the Recorder.

plaintiffs were refused their costs in ourt below, inasmuch as the amount hich judgment was given was within urisdiction of the Court of Small s. We should have thought the plaint- ntitled to their costs notwithstanding, r the fact that, although Mr. Elmes's was exorbitant, the Bank's offer was ly unreasonable. They made no offer h Mr. Elmes could have accepted, and Court's decision was equally far removed the ground taken by either of them. therefore think we ought to vary the e of the Court below so far as to re that the plaintiffs are entitled to er from the defendant Rs. 935 in lieu of Rs. 646. The order as to costs to stand, and each party to pay his own costs of this appeal.

The 25th April 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Mistake of Boundaries—Construction of Conveyance—Intention of the Parties—Hindu Widow's Power to grant Permanent Tenure—Her Interest in the Accumulations and in the Income—Ratification by Reversioners—Limitation—Partition and Khas Possession.

Case No. 45 of 1874.

Regular Appeal from a decision passed by the Second Subordinate Judge of the 24-Pergunnahs, dated the 9th February 1874.

Sreemutty Puddo Monee Dossee (Plaintiff), *Appellant,*

versus

Dwarkanath Biswas and others (Defendants), *Respondents.*

The Advocate-General, Messrs. W. C. Bonnerjee and *R. T. Allan*, and *Baboo Ashootosh Mookerjee* for Appellant.

Mr. J. T. Woodroffe and *Baboos Ashootosh Dhur, Roma Nath Law*, and *Sreenath Chunder* for Respondents.

Where by mistake a part only of the premises intended to be mortgaged is described in the deed, and would alone pass under a bill of sale in execution to the auction-purchaser, HELD that the Court ought to interfere for the rectification of the instrument, and that, regard being had to the intention and subsequent dealings of the agreeing parties, it ought to be construed as if it had *expressly* and *fully* mortgaged and conveyed the entire premises in question.

Where a piece of land is held partly by a permanent lease and partly by an *amulnama* granted almost simultaneously and intended eventually to be changed for a lease, and thereupon the whole piece of land is thrown into one compound and occupied, and new buildings are erected thereupon with the consent of the lessor, and there is no failure on the part of the lessee to comply with the terms of the grant, HELD that the permanent grant is to be impliedly extended to the entire premises in question, notwithstanding that no lease was formally granted with respect to the remaining portion as originally contemplated.

It being doubtful whether the purchase of the land in dispute by the plaintiff's mother was made out of the *current income* (in which case it is her self-acquired property) or out of *accumulations* of her husband's estate, HELD (broadly following the principle laid down in *Soorjeemonee Dassee* vs. *Denobundo Mullick*, 9 Moore, p. 123) that the purchase being made with moneys derived from the income of her husband's estate then lying in her hands, she was competent to alienate her right and interest in whole or in part to re-convert them into money, and spend it if she chose.

Grose vs. *Amritomoyee* (4 B. L. R., O. C. J., p. 40) explained and reconciled; and *Gonda Koer* vs. *Koeroodoy Sing* (14 B. L. R., p. 164) distinguished.

The plaintiff having known the nature of the original grant, and herself recognized and acquiesced in the acts of the lessee, HELD that she was bound by the acts of her mother, which as a whole resulted beneficially for the estate; and that in any case she was precluded from questioning them now by the law of limitation, the present suit having been brought more than 12 years subsequent to the death of the mother.

The Appellate Court is competent to deal with the point of limitation as being one of pure law, although it may not have been entertained by the Court below:

HELD that, in a suit for partition like the present one, the land in dispute, being in the exclusive possession of a single co-sharer, should fall *as a whole* in the share of one or other of the co-owners, and not be sub-divided among them.

Jackson, J.—THE plaintiff brought this suit against five persons, of whom the first four were the sons of one Muthoor Mohun Biswas, deceased, and the fifth is Jugodumba, the widow of Muthoor Mohun, and the only sister of plaintiff herself. The suit was for declaration of the plaintiff's title jointly with her sister to 13 beeghas of land, for ejectment of the defendants, for partition of the land into two equal parts, for khas possession of one-half share, mesne profits, and costs of suit under the fol circumstances. It was alleged that C. B. Stewart had taken, by interchan pottah and kubooleut, from Rash Dossee, at a rental of Rs. 169 per an 13 beeghas of land, being part of purch lands owned and held by the said Monee (mother of plaintiff and of defe No. 5); that, on the death of Rash Mo the plaintiff and defendant No. 5 as her succeeded in equal shares to the property by her; and that Stewart continued ta to her (plaintiff) and to her sister, defend the rent reserved in the pottah till his d in 1271, from which date no rent had paid to the plaintiff, whereby she bec entitled to khas possession, and endeavo on 5th Cheyt 1274, to enter on such pos sion, but was obstructed by Muthoor Mo who, in collusion with defendant No. 5, wife, remained in wrongful possession he died, after which his sons, the defend 1 to 4, in like manner, kept wrongful pos sion, and therefore this suit.

The main answer to this plaint was of Jugodumba, defendant No. 5. Her gations were the following: That Ste had taken, along with other pieces of from other owners, 5 beeghas from Monee under a mourosee pottah; had thr all this ground into one compound and thereon a large house with out-offices; the plaintiff's assertion of the area being 13 beeghas was false; that Stew in May 1863, mortgaged the whole land premises to Mr. Peterson, who (after death of Stewart) sued upon his mortga and obtained an order for the sale of property which was knocked down to her hu band, Muthoor Mohun, on the 27th Augu 1867, for Rs. 27,000; that he got into posse sion and enjoyed the property till his death when the defendants, his sons, succeeded; that they first made a gift to her of a smal portion of the ground, and three of them

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afterwards made her a gift of the remainder, whereon the defendant had commenced and was then proceeding with the erection of a large temple, on which, at the commencement of the suit, a large outlay had already been incurred; that she consequently, as representative in title of Stewart, was lawfully in possession as mourosee mokurrureedar; that all questions relative to the partition of joint property between her and the plaintiff had been determined by a partition-suit and decree in the High Court, Original Jurisdiction, and that, moreover, from the ground in question having become mixed up with the ground obtained by Stewart from other sources, partition was impossible; that consequently, if the land in question was to be the subject of any fresh decision as to partition, it ought to be assigned as a whole to one or other owner in the general division; that plaintiff was not entitled to khas possession, but to her share of the rent, which she could have whenever she pleased.

Two only of the other defendants (Nos. 2 and 3) filed a written statement. They generally confirmed the allegations of their mother; they likewise spoke of the land as consisting of 5 beeghas, but did not make the specific statement on that head which was made by their mother. (The Court below thinks this difference was designed, the men having a fear of the penalties of perjury from which a purdanasheen woman might be supposed to be exempt. We think this conjecture ill founded and attach no importance to the variation.) The defendants, moreover, all alleged that plaintiff had received rent from the mourosee mokurrureedar after he acquired Stewart's rights by purchase.

It may be mentioned here that plaintiff, after she had lodged her plaint, applied for an injunction to restrain the defendant, Jugodumba, from proceeding with the erection of her temple, stating that, if she (plaintiff) succeeded in her suit and got possession, it would be repugnant to her feelings as a Hindoo to pull the temple down, and that consequently to continue the building would be a continuance of waste. This application, however, on cause being shown, was refused.

Subsequently, after hearing evidence, the Subordinate Judge, in an elaborate and able judgment, dismissed the plaintiff's suit.

We think it unnecessary to set forth in our judgment the various issues which were framed and inquired into, because some of them are now immaterial, and others may, with convenience, be stated differently and in different order.

The Court below found in short that Stewart had taken 13 and not 5 beeghas from Rash Monee—5 under a regular mokurruree pottah, and the remainder under an amulnama which was to have been exchanged for a pottah after final measurement of the land; but that no such further steps had been taken, the tenancy continuing on the footing of the amulnama. That Stewart had given a mortgage to Peterson, but, by mistake, the deed of mortgage only operated on Stewart's land other than what had been taken from Rash Monee; that the Court had ordered a sale of the property, but that, by a like inadvertence, the Registrar of the Court, in its Original Jurisdiction, had only sold, that is, his deed only conveyed, the like portion; that in consequence the defendants had not acquired any title, but that plaintiff was not thereby entitled to re-enter, the title being still in Stewart's representatives. He found that plaintiff had received no rent since Stewart's death, but held that such failure gave her no right to re-enter. Being therefore of opinion that plaintiff was not entitled to khas possession, but that the defence had not been wholly honest, he dismissed the suit, but without costs.

The plaintiff appealed to this Court, and the appeal came on for hearing first on the

25th January 1875. On that occasion, it was contended, and as we thought with reason, that it was material to inquire whether Rash Monee had power to grant the pottah and amulnama; and, for the reasons stated in our interlocutory order of that day, we sent the case down for a finding on that issue. This point was considered very fully and discussed at great length by the Subordinate Judge, with the result that he found it not proved that Rash Monee had no authority to grant the lease, and that he found circumstances which, in his opinion, fully justified the grant. He reported that, with reference to this part of the inquiry, a plea of limitation had been raised; but that, conceiving himself precluded by the terms of our order, he had not heard the parties on that question. The plaintiff, appellant, thereon filed her objections to such finding, and the appeal came on again for hearing on the 7th December last.

It may be taken as undisputed now that Rash Monee gave Mr. Stewart a pottah for 5 beeghas in 1859, and an amulnama for 8 beeghas more in April 1860; and that it was their mutual intention that the whole 13 beeghas should be held by Stewart as a mourosee and mokurruree holding, and that Stewart occupied and paid rent accordingly to the time of his death in June 1864; that Muthoor Mohun Biswas bought whatever was sold under the Court's order; and that in consequence he got possession of the land in dispute Finally that Jugodumba is now clothed with whatever rights Muthoor Mohun acquired.

The material questions in this appeal are, it seems to us, the following :—

1st.—Does the defendant, Jugodumba, completely represent in estate Mr. C. B Stewart?

2nd.—Did Stewart hold all the land including that to which the amul relates by a mourosee mokurruree ten

3rd.—Had Rash Monee power to such tenure (and this inquiry raise question of ownership of the land w these 13 beeghas formed a part)?

4th.—Has the plaintiff recognized ratified Rash Monee's act by the rec of rent or otherwise?

5th.—If these two questions be d mined in the negative, is the present out of time?

6th.—If the tenure be not valid, is plaintiff entitled to a partition and to im diate possession of a moiety?

As to the first of these questions, doubtless true that the mortgage-deed favour of Mr. Peterson contained by sp cation of boundaries only that portio his Pittaghur premises which he had chased from the Biswas zemindars, b 13 out of the 26 beeghas, or, to descri in a different way, the other half of compound from that now in dispute; we entirely concur with the Court b in thinking that Stewart intended to gage, and that Peterson intended to tak mortgage, the whole compound and b ings standing on it, and that the defec the deed, undiscovered by the parties, a from the mistake, and it must be said want of care, of the attorneys who d up the deed, and who for this purpose ferred only to the English conveyance w gave Stewart title as to 13 beeghas wit examining the Bengali document wh gave him title to the remainder. It sho be added, however, that the mistake greatly promoted by the identity of Biswas zemindars who conveyed the beeghas in question with the superior la lord of Rash Monee under whom the t other principal portions were held.

It is also true that the conveyance execu ed by the Registrar on the Original Side to

Muthoor Mohun carried on the mistake by using the same terms as those contained in the mortgage-deed, which, indeed, was natural and inevitable, unless the Court, at the time, had ordered otherwise. But it is no less clear that the Court intended and ordered the sale of the entire mortgaged premises in the same manner as the mortgagor and mortgagee mutually understood themselves to be dealing with the whole land and premises.

This consequently appears to us to be precisely one of those cases in which the Court would, if called on, interfere for the rectification of instruments which imperfectly carry out the intentions of the parties agreeing, and we shall, therefore, treat these instruments as if they had fully and expressly mortgaged and conveyed the whole of his premises, such a course being, moreover, in accordance with the behaviour of Stewart's own representatives who surrendered up the whole of the premises after the sale, and have never since questioned the effect of it as a transfer of the whole property; nor is the price paid by Muthoor Mohun at all an element for consideration here. Though less by a good deal than what Stewart had spent, it was not inconsiderable, nor was the depreciation greater than is common in such cases. Moreover, Muthoor Mohun was not a party to the suit, and had no share in bringing on the sale, and he bought at a public auction. This question, therefore, we decide in favour of the defendants.

Upon the second point, we are clearly of opinion that the amulnama for 8 beeghas is now as much binding on Rash Monee and her heirs as the pottah for the 5 beeghas first granted. It was, undoubtedly, in contemplation to execute a further and formal pottah after measurement, but Rash Monee did not think fit to measure. Stewart did all that he was called upon to do. He paid the consideration, he afterwards paid his rent. He was allowed to enclose the whole area, and he finally built his house and out-buildings partly on the land in dispute, and he certainly would not have built in that position at all, unless he had been assured of his grant in perpetuity. We are, therefore, of opinion that Rash Monee, as far as she could, conferred upon Mr. Stewart a mourosee mokurruree right which extended to the whole 13 beeghas held by her.

We come now to consider whether such act of Rash Monee was valid and is a good answer to the plaintiff's claim to re-enter; and in connection with this issue it has been debated whether the property of which the 13 beeghas formed a part was included in the husband's estate or was Rash Monee's streedhun; whether it was purchased out of the income of the estate or out of accumulations; whether Rash Monee distinguished her separate estate and kept separate khattas and accounts thereof, and so on; and plaintiff has contended that, if the property in question was purchased out of accumulations of the income, or, if not, as part of the income converted into land and so impressed with an immoveable permanent property, it merged in the *corpus* of the husband's estate, and so was beyond the power of a Hindoo widow to alienate, for that the grant of a mourosee mokurruree tenure was as much an alienation in the eye of the law as if she had sold the land out and out.

It is clear that Rash Monee was, for many years, in the enjoyment as widow of an estate yielding little, if anything, short of 65,000 rupees yearly, and possibly more. This is stated, we find, by a witness of the plaintiff's own as the income of the Calcutta property alone. The price paid for the

property in question was a little over Rupees 10,000, or less than a sixth part of the year's income. It is not very clear whether Rash Monee had any property of her own besides what she inherited from her husband. If she had, it probably was very small. Evidence has been offered to show that she had separate accounts, and the conclusion, perhaps, cannot be very certain. If the property was not purchased with private funds of Rash Monee's own, there are certainly no materials for a determination whether she bought it out of current income or out of accumulations, the former is quite as possible as the latter. But we are inclined to think this inquiry unimportant, and to base our decision, if necessary, on a broader and clearer ground, *viz.*, that Rash Monee, having purchased this land (if she did so) with moneys derived from the income of her husband's estate then lying in her hands, was competent afterwards to alienate her right and interest in whole or in part, to re-convert them into money and spend it if she chose. We are, indeed, prepared to go so far as this, but it is unnecessary in this case, because the act of Rash Monee was, in fact, highly beneficial to the estate, for she, not merely obtained a bonus which came back into the coffers of the family, but secured a large rent payable for ever. It must be observed, indeed, that the position of the plaintiff as to this matter in the latter stages of the suit is very widely shifted from the ground which she took in the plaint. The litigation has been a remarkable instance of the cropping up of fresh points, themselves in turn giving rise to new objections. But we have not thought it proper to limit the investigation, as it seemed best to consider every point which could be suggested, the case being likely to be carried as far as animosity and the possession of ample means would dictate.

According to the language of the plaint, the property out of which these 13 [illegible] were granted was "the purchase[illegible] "bearing and rent-free as well as [illegible] "and mokurruree lands owned and [illegible] "the late Rash Monee Dossee," to [illegible] "on the death of our mother aforesaid, [illegible] "the co-sharer-defendant No. 5, as her [illegible] "succeeded in equal shares to the pro[illegible] "left by her." Not a word is here [illegible] the property being part of the [illegible] estate, but it is treated as Rash M[illegible] absolute property to which the plaint[illegible] the defendants, as her heirs, had succe[illegible] But is the mourosee lease granted by [illegible] Monee from any point of view i[illegible] as against her daughters, and partic[illegible] as against one of them only? It s[illegible] indeed that, on the death of the w[illegible] the daughters take absolutely, and, [illegible] widow has exceeded her powers, they [illegible] avoid the alienation in like manner as [illegible] reversioners may. But has the wido[illegible] this case, exceeded her rights?

Let us consider the case first as o[illegible] purchase out of current, *i. e.*, the y[illegible] income, as we have said appears [illegible] probable. It in that case becomes [illegible] self-acquired property obtained with m[illegible] which unquestionably was hers to s[illegible] if she thought fit. If she had squand[illegible] the whole amount on frivolous plea[illegible] or bestowed it on her father's rela[illegible] the heirs would, according to a curre[illegible] modern decisions, have had nothin[illegible] complain of. She has not done so, [illegible] she has spent it in land of which the [illegible] has been allowed to descend to the h[illegible] As to the particular portion, she has alie[illegible] a part of the owner's right in terms w[illegible] advantageous to the heirs. But [illegible] Advocate-General contended that, by co[illegible] verting the money into land, she made [illegible] irrevocably part of the *corpus*. We [illegible] no authority for this contention.

But we can conceive a case in wh[illegible]

dow having no present occasion for ing moneys, but, foreseeing one after pse of a year or two, had thought sable to invest the money temporarily nd, can she, when the anticipated ion arrives, re-sell the land and take money, or can the heirs step in and "No. You have unintentionally ught this money into the *corpus* of estate by converting it into land, and ell the land now will be waste which are entitled to restrain"?

e will next take the case of accumula- There is, in 9 Moore's Indian Appeal the case of Soorjo Monee Dossee Dino Bundhoo Mullick, in which the ial Committee held that the appellant "entitled absolutely in her own right all such interest and accumulations as, ce the death of Suroop Chunder Mullick, or have arisen from the one-fifth rt of the accumulations to which e is before declared to have been titled."

the later case of Genda Kooer *vs.* er Oodoy Singh, 14 Bengal Law orts, page 164, the Lords there sitting red some disposition to recede from the mentioned ruling, yet their Lordships' al to apply it to the case then before was based on grounds of distinction ch do not exist in the present case, being a Bengal case, and the heirs of h Monee herself being identical with the s of her husband.

There is a case more directly in point, ing that of Grose *vs.* Amritamoyee Dossee, Bengal Law Reports, Original Civil isdiction, page 40, in which Mr. Justice acpherson clearly holds that there is a tinction between accumulations and come, and observes that there is no authority which permits the widow to deal with accumulations as she may with income.

It is to be observed that this was an appeal heard by Peacock, C.J., and Macpherson, J., and the Chief Justice is silent on this point as he held the agreement complained of to be invalid on other grounds. The case of Soorjomonee Dossee appears to have been cited in the argument, but is not noticed by Macpherson, J. But what are accumulations in the view of these cases? Not surely the accidental balances of one or two years of the widow's income, but a fund distinct and tangible. There is nothing whatever in this case to indicate that any such fund ever had been formed or had existed, and we see no reason to suppose that accumulations had ever arisen, except that the widow may have spent in some years more, in others less, and in that sense the savings of the less costly year might be an accumulation to meet the charges of the next; and as already observed there is not even technical "waste." The dealings of Rash Monee with the property should, we think, be considered as a whole, and in that light, they result in a material increase both of property and of income to the heirs.

And, if the evidence for the plaintiff on this point proved much more than it does, we should still hesitate in the face of her own declaration in the plaint. On this point also, therefore, we find for the defendant.

The next question is that of ratification or adoption by the plaintiff of the act of Rash Monee. We think, in the first place, there can be no doubt that plaintiff knew the nature of the first pottah at any rate, and the plaint seems to show that she or her advisers believed the whole 13 beeghas to have been granted by the pottah. The

person who drew up the pottah has since been her own confidential servant, and the fact of Stewart's taking the ground and building extensive premises upon it would be notorious. We find it stated in the plaint itself that Stewart continued to pay rent after the death of Rash Monee to plaintiff and her sister so long as he lived, and in all these years there has never been a suggestion of avoiding the lease until the land having come into Jugodumba's hands, she began to signalize herself by an act which, whether it means genuine piety or only ostentation, was likely to give offence to a sister with whom she was on bad terms, and who would be, in accordance with human nature, her persistent enemy as being of her own household.

But, if this were not so, the suit would, in our opinion, be too late, for both grants are antecedent to the death of Rash Monee, which took place in February 1861, the plaint having been filed on the 19th March 1873. Possession had thus been held under those grants for more than twelve years before the commencement of this suit. The Subordinate Judge refused to entertain this plea as already mentioned, but it is purely a question of law, and we have no difficulty in dealing with it on the record.

There can be no doubt the plaintiff well knew on what terms the land was held and by whom it was held, and there is nothing on record from which we can infer that such knowledge arose at any time subsequent to the death of Rash Monee. The plaintiff affects in her plaint entire ignorance of the purchase by Muthoor Mohun and of the fact that Jugodumba was in possession; and yet we find her immediately after applying for an injunction to restrain the defendants from proceeding with the erection of the temple, with an assumption of tenderness of conscience which, considering the circumstances, appears to us extremely offensive. We therefore, irrespectively of other circumstances, hold the suit to be barred by limitation.

And upon the last question of all, reference to our decision of the other the plaintiff has of course, in our opi no right whatever to khas possession. even if the defendants' title were imp and Rash Monee's lease invalid, and the good time, we should have great diffic such a case in directing a partition of land which has come into the possession of of the co-owners in the way described should certainly direct, if the matter not, as it seems that it is not, disposed the decree of this Court in its Ori Jurisdiction, that the land should fall whole into the share of one or other of two, and probably into the share of the defe ants.

We, therefore, affirm the judgment of Court below, and dismiss the appeal. suit appears to us exceedingly vexa and, although the complication of the and of the issues raised has obliged us at some length into the case, we think it been conspicuous throughout that justice on the side of the defendants.

We do not, on the whole, take so unfa able a view of the defence as the C below has taken, but we do not distu order as to costs. But the plaintiff must all the costs of this appeal, including reference under section 354.

The 27th April 1876.

Present :

Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

ent-debtor—Inheritance—Decree-holder.

Case No. 370 of 1875.

laneous Appeal from an order passed the Subordinate Judge of Furced-, dated the 20th September 1875.

Mr. N. P. Pogose (Decree-holder), *Appellant,*

versus

ooddeen Mahomed Ahsan *alias* Ali-oddeen Chowdhry (Judgment-debtor), *pondent.*

he Officiating Advocate-General and *Mr. C. Gregory* for Appellant.

aboo Sreenath Doss for Respondent.

re a judgment-debtor becomes, by inheritance, the decree-holders in respect of the same pro-r a share in it, the effect of the inheritance, s to a part or as to the whole of the decree, is guish it *pro tanto.*

kson, J.—In this case it is sufficient that we concur in the view taken by ubordinate Judge. We considered for ment whether it was possible to make distinction between the capacity in Azim Chowdhry was the judgment-r and that in which he became one of ecree-holders as representing his de-d wife; but it appears to us that the equence as regards that share in the e is the same as it would have been if d purchased the whole or a part.

e think the effect of inheritance as to t or as to the whole is the extinction e decree *pro tanto.* The appeal is dis-ed with costs—five gold mohurs.

The 3rd May 1876.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Review of Judgment—Fresh Evidence.

Case No. 1664 of 1875.

Special Appeal from a decision passed by the Subordinate Judge of Moorshedabad, dated the 4th May 1875, reversing a decision of the Moonsiff of Jungypore, dated the 25th February 1875.

Mr. C. G. D. Betts and others (Plaintiffs), *Appellants,*

versus

Bonsi Mundul (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellants.

Baboo Anund Gopal Paleet for Respondent.

Where a suit under the Rent Law was dismissed, and the Moonsiff granted a review of judgment on fresh evidence without satisfying himself that it had been out of plaintiff's power to produce such evidence at first, HELD that the Moonsiff had acted illegally and without jurisdiction, and that the Subordinate Judge was right in reversing his judgment after the re-hearing, but that the decision did not prejudice plaintiff's liberty to appeal from the original decision.

Jackson, J.—This was a suit by the landlord for khas possession or ejectment of the defendant, his ryot.

The defendant pleaded, amongst other things, that, by occupancy for more than twelve years, he had obtained what is called the right of occupancy, and he could not be ejected; and this plea of his was made out in the judgment of the Moonsiff, who accordingly dismissed the plaintiff's suit.

After the suit was dismissed, the plaintiff tendered some additional evidence, and with-

out affording proof to the satisfaction of the Moonsiff that such evidence was not within his power to produce at the time of the suit, he succeeded in obtaining a review of judgment. Thereupon further investigation took place, and finally the Moonsiff, by a second judgment, gave the plaintiff a decree. That decree not being commensurate with the plaintiff's claim, both parties were dissatisfied and appealed against it, and both the appeals came before Baboo Amrito Lall Chatterjee, the Subordinate Judge. He first took up the appeal of the defendant, and, finding that the petition of review had been admitted improperly and contrary to the ruling of the Full Bench in 11 Bengal Law Reports, page 423, he entirely set aside the second judgment of the Moonsiff, and declared that the suit should be dismissed as it was done by the Moonsiff in the first instance.

It is contended before us that the Lower Appellate Court ought not to have set aside the judgment in review, inasmuch as the defendant had not made effectual objection to the reception of that petition. Now it is shown to us, however, that the defendant did all that he could by making a petition of objection to the admission of the review. It is clear from the ruling of the Full Bench that the defendant could, at that time, do nothing more, the order of the Moonsiff granting the review being final, although the decision itself is open to appeal. It was on the occasion of the appeal that the defendant renewed his objection, and the Subordinate Judge was, therefore, quite right in interfering with what the Moonsiff had done illegally and without jurisdiction, and reversing a judgment so obtained. This special appeal, therefore, must be dismissed with costs.

Mr. Allan has represented that, in that case, his client will have no remedy as regards the first objection by which the suit was dismissed. We might not, perhaps, be m disposed to sympathize with him in matter; but, as at present advised, we inclined to think that the plaintiff may m an application to the Lower Appellate C for leave to appeal against the judgm originally pronounced, and the Court m thereupon, if it thinks fit in the exercis its discretion, admit the appeal, regard bei had to the mistaken proceedings wh followed upon the petition of review. this is a matter wholly within the discre of the Lower Appellate Court.

The 3rd May 1876.

Present:

The Hon'ble Louis S. Jackson and W. F McDonell, *Judges.*

Rejection of Plaint under Section 15.

Case No. 1600 of 1875.

Special Appeal from a decision passed the Officiating Additional Judge of 24-Pergunnahs, dated the 17th Ju 1875, reversing a decision of the Fi Moonsiff of Alipore, dated the 9th Ja uary 1875.

Sreemutty Shoovankurry Dabee (Plaintiff), *Appellant,*

versus

Dwarka Nath Mookerjee (Defendant), *Respondent.*

Baboos Ashootosh Dhur and *Mohinee Mohun Roy* for Appellant.

Baboo Doorga Mohun Doss for Respondent.

The extraordinary powers conferred on High Courts by section 15 are only exercised when, *firstly*, there has

ital error in the judgment of the lower Court; lly, the plaintiff has entitled himself to special nce. The rejection of an application under does not necessarily amount to a decision on s. Where a suit for rent was thrown out by a and subsequently thrown out by a Small Cause d in either case the High Court refused to under section 15, but a different Moonsiff in- the second order of the High Court as a of the first, and entertained the suit, HELD gh the action of the High Court did not affect s, yet, as plaintiff had a substantial claim, the oonsiff did right in receiving it.

son, J.—THE only question which called on to decide in this case is the Judge was right in holding that, he circumstances, the Moonsiff had y to entertain the suit. It was a the landlord to recover rent. The at first sued to recover this rent in rt of one of the Moonsiffs of Alipore, rew out the plaint—returned it, we . The plaintiff then, being given to and that the proper Court for suing Small Cause Court of Sealdah, went The Small Cause Court, in turn, ut the plaint, and the plaintiff then this Court, and applied for an order, ection 15 of the High Courts Act, g the Moonsiff to receive the plaint. hat application, the Court did not t to make any order. In another ecisely similar, the plaintiff afterwards to the High Court for a similar order Small Cause Court. That application o refused. This suit was then again ed in the Court of a different Moon- Alipore, and it being objected that had been once thrown out, and that intiff had unsuccessfully moved the Court in the matter, the Moonsiff to have held that, although the Court had refused to make an order in nce with the plaintiff's first prayer, t, by afterwards refusing to make a order on the Small Cause Court in a se, the High Court had in fact varied its own decision in the matter of the previous application. He therefore entertained the suit, and gave judgment for the plaintiff. One of the defendants appealed, and the appeal was tried before Mr. Cornell, the Officiating Judge of the 24-Pergunnahs. Mr. Cornell tried the appeal merely on the point of jurisdiction. He considered, in the first place, that the order of the fourth Moonsiff, who had rejected or returned the plaint, debarred the first Moonsiff from afterwards entertaining the same point. He also considered that the order of the High Court, refusing to direct the Moonsiff to receive such plaint, ought to have guided the first Moonsiff, and he consequently threw out the plaint. Now it is necessary to observe that both the Courts appear to have quite misapprehended the effect of the order of the High Court refusing to interfere under section 15 of the Statute. That is a section giving extraordinary powers to the Court, at least it has been so interpreted; and it is one on which the Court never acts unless it is satisfied of two things—firstly, that there has been a capital error in the judgment of the Court below which is complained of; and, in the next place, that the plaintiff has entitled himself to the special interference of this Court. It, therefore, constantly happens that an order under section 15 is refused by this Court, not thereby importing that the action of the Court below has been right, but simply because the application has not been made under circumstances which would induce this Court to exercise its extraordinary powers. The Additional Judge was, therefore, we think, wrong in considering that the order of this Court, dated the 18th of March 1874, ought to have had any influence with the Moonsiff in dealing with this suit. The question then remains whether the Moonsiff was precluded by the act of the former Moonsiff—whether he was his predecessor, strictly speaking or not—from refusing the

plaint. It is clear that the plaintiff has been put to very great hardship. He had a claim for rent against the defendants. From the judgment of the Moonsiff, dated the 9th of January 1875, it would appear that that was a just claim. He has been shut out, first, by one Court, and then by another. The only mistake that he seems to have made is that he did not, upon the rejection of the first claim by the Moonsiff, go to the District Judge in appeal. We think such a mistake on the part of the plaintiff ought not to debar him from having an inquiry into his suit; and as the plaint was received by the subsequent Moonsiff, and the suit was inquired into upon its merits, it appears to us that the Additional Judge ought not to have entertained the technical objection, but ought to have tried the appeal on the merits, and seen whether anything was due to the plaintiff from the defendants or not. We reverse the judgment of the Lower Appellate Court, and direct the appeal to be tried on its merits. It may be remarked that the Moonsiff, succeeding afterwards to the jurisdiction possessed by the former fourth Moonsiff, might, without any serious stretch of his powers, entertain by way of review the application, and try this suit. He was not debarred from doing so by any previous appeal, and, if we understood him to have dealt with it in that way, we should not certainly be disposed to interfere. The costs of this appeal will abide the result.

The 17th May 1876.

Present:

The Hon'ble A. G. Macpherson and E. Birch, *Judges.*

Rent-suit—Rate fixed under Act VI. (B. C of 1862, s. 10.

Case No. 745 of 1875.

Special Appeal from a decision pass the Subordinate Judge of Zillah R pore, dated the 9th of January modifying the decree of the Moonsi Bhotemarry, dated the 21st of Febr 1874.

Hurry Sankar Patwari (Defendant), *Appellant,*

versus

Sheikh Badha Chowdhoory (Plaintiff) *Respondent.*

Baboos Mohini Mohun Roy and *Shara Charan Mitter* for Appellant.

Mr. C. Gregory and *Baboo Girija San Majoomdar* for Respondent.

In order to object to the proceeding of the Colle under section 10 of Act VI. (B. C.) of 1862, the pr course for the ryot is to appeal to the District Ju and not wait until the zemindar brings a suit for an of rent on the basis of the rate fixed by the Collec

The arrears of rent due for more than three y before the institution of the suit HELD to be barre

THE plaintiff sues the defendant rent, at the rate fixed by the Collector, the 29th June 1870, in a proceeding un section 10 of Act VI. (B. C.) of 1862.

It may be doubted whether the proceedi of the Collector were regular, and whet they might not have been set aside by t defendant Hurry Sankar and the oth tenants whose rates of rent the Collect recorded in those proceedings if they h come forward and objected at the prop time and place. They preferred, howeve to remain out of sight, and to ignore a

b

notices and summons served upon them, and to allow the Collector to proceed as he did; and they failed to take the means which the law prescribes for setting aside such proceedings, for they never appealed against the Collector's order.

No doubt a landlord is placed in a very difficult position when the tenants combine against him, and, withholding all information, refuse to appear when the Collector proceeds to ascertain the rates of rent payable by them. Tenants would, however, do well to bear in mind that it is possible to abstain over much (so far as their own interests are concerned) from acknowledging or appearing in any proceeding which parties may take against them with a view to enforcing their rights. And, in the present instance, the defendant has possibly considerably damaged his own interests by the obstinate course he pursued.

The defendant urges now that the proceedings before the Collector were all bad. But, if they were, he ought to have appealed against them at the proper time. Moreover, the Collector's jummabundee has been accepted as the basis of at least three decrees for rent which have already been made in other suits; and, in one of these suits, the defendant Hurry Sankar was apparently a defendant.

Independently of this, however, there is on the record evidence (apart from the Collector's jummabundee) as to the rates of rent payable; and on that evidence also the Subordinate Judge finds that the defendant is liable to pay rent at the rate which he has decreed. The Subordinate Judge is satisfied with this further evidence; and we, in special appeal, cannot question his finding, as there is undoubtedly some evidence to support it.

So far there is no reason why we should interfere with the decree of the Lower Appellate Court.

But, as to the only ground of appeal mentioned in the memorandum of appeal filed by the appellant, *viz.*, that the plaintiff's claim is barred except as regards the rent which accrued due within three years of the institution of the suit, we think that the decision of the Subordinate Judge is wrong. All rents which accrued due more than three years before suit were clearly barred, and the decree must be altered accordingly.

The parties will bear their own costs of this appeal.

The 23rd May 1876.

Present:

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Construction of Pottah—Conditions for Re-settlement—Occupancy and Jotedaree Rights—Eviction on expiry of Lease.

Case No. 108 of 1875.

Regular Appeal from a decision passed by the Judge of Zillah Moorshedabad, dated the 21st January 1875.

Ranee Shoorut Soondry Dabea (Plaintiff), *Appellant,*

versus

Mr. Charles Binny, Mr. Robert Jardine, Mr. John Skinner, Mr. J. R. Bullen Smith, and Mr. T. H. Wardie of the firm of Messrs. Jardine, Skinner, and Co. (Defendants), *Respondents.*

Baboos Mohinee Mohun Roy, Sreenauth Doss, and *Kissory Mohun Roy* for Appellant.

Mr. R. T. Allan and *Baboo Bhowany Churn Dutt* for Respondents.

HELD that no farmer can, during the term of his lease, create for himself a sub-tenure which is to endure after

the lease expires to the prejudice of the owner whose *locum tenens* he is; and that no occupancy or *jotedaree* rights, which relate to a specific extent of land, could be acquired in respect of an undivided share of an estate.

Where, upon a consideration of the terms set forth in the lease, it was found to be a stipulation that the jote was not to terminate *ipso facto* with the conclusion of the *ijara*, but that it was open to the parties to make a fresh agreement in respect of the land upon the quantity and rents being measured and assessed in accordance with the productive power of the land, HELD that the plaintiff was entitled to a decree for *khas* possession, the stipulation being extremely uncertain in its character, and the defendants having done nothing for years in response to the proceedings taken by the plaintiff.

THIS was a suit by Ranee Shoorut Soondry Dabea against the gentlemen composing the firm of Messrs. Jardine, Skinner, and Co, to recover khas possession of certain lands, the claim being laid at Rs. 54,068-7 annas. The plaintiff is the owner of a share which is described as the 2 annas 15 gundas share of Pergunnah Lushkerpore Burro, Turuff Hissa, within which are certain mouzas, and it is the plaintiff's share of the rents and profits of 21,000 beeghas of chur and accreted lands within that pergunnah to which the present suit relates. The plaintiff stated that, in 1272, the defendants took an ijara-settlement of her zemindari in those mehals for a term of five years, expiring in 1276, and that a pottah and a kubooleut were executed on that occasion, containing a stipulation which is the subject of principal controversy in the present case. That stipulation is that the defendants were to hold these lands by way of jote—the rent of Rs. 609-4 annas having been received in respect thereof, and included in the ijara-rent of Rs. 4,417. The agreement went on to say that, on the expiration of the term of the ijara, "a pottah and a kubooleut will "be given and taken in respect of the "jote with reference to the quantity of "land and the amount of rent, which will "be established to belong to yo "share, in accordance with the pro "power of what the land will be "to be in quantity upon a measu "of the said chur. If I do not "pottah and give a kubooleut withi "months after the fixing of the r "that land, you will make a settl "with others to which I shall "able to make any objection." Now, alleged that the term of the ijara expired as before mentioned at the 1276, the plaintiff did, in 1279—it ap from the notice that it was on the Pous 1279—inform the defendants th had measured the lands, and foun area to be 21,818 beeghas, being abou beeghas more than the quantity prev estimated, and the rent to which sh man ed in respect of her share o land amounted to Rs. 4,005 upon the There were two notices—one of which re to a portion of the lands cla *viz.*, 1,414 beeghas; and the other related to the remainder. The defen refused to come into this arrangement made no offer of their own, and conseq the plaintiff endeavoured to reduce the into khas possession. Thereupon there a case under section 530 of the Criminal cedure Code in the Court of the Magi of Junghipore, which ended in an made in favour of the defendants. plaint concluded in these words: "As "defendants have no right whatever to "the land, I beg to bring this suit for "khas possession of it by evicting "defendants, laying the claim at Rs. 54,06 "the actual value of the said land."

The defendants put in their written s ment, in which they alleged, amongst o things, that they held the share of plaintiff and of certain other co-sharer a legal jotedaree right, having, as they a mowrosee jote in respect of certain

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who are specified. They then that, having held the lands in dispute right for upwards of 12 years since rmation, they had acquired a right upancy, and could not be evicted. further disputed the measurement and es, and they said they had been and ill ready to take the pottah at a reason- rea and jumma. They denied that intiff had taken khas possession, and that the suit might be dismissed. it came on for trial before Mr. Field, istrict Judge of Moorshedabad. He d six issues, of which he first tried rth and the fifth, *viz.*, "Was there a aree holding by defendants of plaint- share, antecedent to, independent of, not merged in, the interest conferred he ijara lease?" And, "If there were a jotedaree holding, has it ripened into ht of occupancy?"

n this Mr. Field's finding was, that efendants had a jotedaree interest in iff's share antecedent to the ijara and not merged therein, but he also that the defendants acquired no right upancy. He then proceeded to con- whether the plaintiff was entitled to e defendants, and, amongst other things, onsidered whether the plaintiff had the proceedings, which in his opinion material, with reference to the clause e ijara-pottah and kubooleut, previous cting the defendants. The issue which udge framed on this point is noticeable, ase it appears to us to contain a miscon- on which led to an error in the deci- He says: "Was there such a breach the conditions contained in the kubooleut the 14th Jeyt 1272 as entitles the intiff to evict." In his view the plaint- claim rested upon some breach of con- ns to be performed by the defendants, h breach had to be made out before the ntiff could succeed. Upon that the Judge came to the conclusion that the plaintiff had not really and fairly measured the lands in dispute; that the pretended measurement had been made behind the back of the defendants; that the rates had not been properly ascertained; and holding that it was not the business of the Court to go into the question of rates or decide what is the proper construction to be put upon the stipulation that the rates are to be fixed according to the productive powers of the soil, he finally observes; "I am of opinion that plaintiff has not fulfilled her share of the agreement; that she has not made a measurement in a manner reasonable in itself and fair to the defendants; and I think that the defendants were justified in refusing to accept a pottah and execute a kubooleut at the rent fixed thus arbitrarily by the plaintiff. The defendants were ready and willing to have the rent fairly assessed. They sent their servants, and intimated this to the plaintiff. I, therefore, am of opinion that they have committed no breach, and that plaintiff cannot eject them on the ground of a breach." So he dismissed the plaintiff's suit. The plaintiff appeals, contending that she has pretty well made out her right of evicting the defendants, and the defendants have made a cross-appeal, being dissatisfied with the finding of the Judge in respect of the nature of their holding. It appears to us that the nature of the plaintiff's suit was very simple and very clear. She was the undisputed zemindar of the land in suit; she alleged that the defendants had no title whatever to retain possession of the lands. She recited the provisions of the ijara lease and the stipulations in favour of the defendants, which stipulations, she said, the defendants had not acted up to, and therefore were not competent to rely upon. She, therefore, asked the Court to give her possession of the lands. The defendants' case in substance was two-fold—*firstly*,

that they had a *bonâ-fide* valid subsisting right of their own in the land irrespective of the ijara lease; and, *secondly*, that they were protected by the stipulations in the lease, and could not be ousted by the plaintiff. Now, taking the first branch of the defence first, it appears to us clear from the evidence, as well as from the law in the case, that the defendants could have no valid jotedaree right or right of occupancy. It is said vaguely that the occupancy of the defendants in the land in question commenced about 5 and 20 years ago. The precise origin of that occupancy is not stated. It is not shown precisely when it began. No grant, lease, or other document is produced, nor is there anything to show in what, any more than at what time, the occupancy originated. But it is amply shown that before the formation or the reformation of the land to which this dispute relates, which took place about 5 and 20 years before the bringing of the suit, the defendants were already in possession of the pergunnah and the adjoining mehals under ijara which they held of the entire Pergunnah Lushkerpore. Their first farming lease of that pergunnah, it is said—and no later date is suggested—was granted in the year 1252, which is anterior to the alleged time of the formation of these lands. At any rate, it seems an irresistible conclusion that the occupancy of the defendants in these lands was connected with, and arose entirely out of, their tenure as ijaradars of the pergunnah. No other origin is either proved or so much as suggested. That being so, the case falls under the repeated decisions of this Court that no farmer or leaseholder can, during the term of his lease, create for himself a sub-tenure which is to endure after the lease expires to the prejudice of the owner whose *locum tenens* he is during the time of his lease. But, even if that were not so, it is impossible o see how the defendants could have acquired either a right of occupancy jotedar's right in respect of an share of an estate. I can only say never heard of such a thing in *Jote* is a term of very wide and signification, and whatever right conferred by it relates to a specific extent of land. I never heard the tion of jote or the right of occupancy right to collect rents as co-sharer estate. It is clear, therefore, that the ants really had no right which they maintain against the will of the plai these lands beyond that which is fo on the stipulation contained in the pottah and kuboolent.

It is necessary, therefore, to inquire the nature of that stipulation, and how far it can be pleaded as a defe the present suit. The words are as I already read, and they seem to import th regard to the lands to which they re the jote, at least the occupancy whic there described as being held as a jote not to terminate *ipso facto* with the clusion of the ijara; but that it was op the parties to make a fresh agreeme regard to that land with reference to quantity and the rents which might assessed upon it in accordance with productive power of the lands. Nothin said as to the manner in which the were to be assessed or the measurement be effected. Nothing is said as to the for which the proposed pottah and ku leut were to subsist. It is, therefore, a st lation which it would be extremely diffic to apply for the benefit of the defend But we should certainly be disposed to all we could in that direction if the defe ants had given us the least assistan Now it seems that, in respect of the arrang ment to be made, the plaintiff took th initiative. She made in some fashion o other a measurement, assessed rent, t

served the defendants with notice. The defendants, no doubt, at once replied to this notice, objecting to the measurement, objecting to the rates, and saying that they were quite willing to give what was a fair rent, and inviting a measurement in their presence and ascertainment of the rent. But they did no more. They had been in possession of the land, as they themselves say, for upwards of twenty years, and they knew therefore precisely what the land consisted of, what the area was, what different kinds of land were comprised in it, and what upon the whole would be a fair and equitable rent. Neither in answer to the plaintiff's notice, nor in answer to this suit, nor up to this date, have the respondents ever breathed one single word on the subject. They kept in their own breasts all the knowledge they possessed, and simply made professions of a readiness to come to terms which were reasonable. It seems to us that, under the circumstances, we have no means of assisting the defendants. The plaintiff, on the other hand, it seems, has done all that she could do; she waited for three years after the expiry of the ijara lease before she gave notice to the defendants, and allowed the defendants to occupy at the old rate, which was very much less than what was now demanded. After that she waited for two years more before she brought the present suit; and, finally, about six or seven years have now elapsed since the termination of the ijara, and the defendants are still holding at the rate of Rs. 609 that which the plaintiff claims to be worth Rs. 4,000. Having regard simply to this circumstance, it appears to us that the defendants had already had the full benefit which they could have derived from the stipulation in the ijara-pottah. They could not have required the plaintiff to give them the land for more than five years, nor could they have expected to hold the land at anything to be so favourable a rent as that at which they have been so long enjoying. That being so, it appears to us that no terms could be fairer than those offered by the plaintiff to-day before the Court. The stipulation on which the defendants relied being extremely uncertain in its character, and the defendants having done nothing to show what would be fair and reasonable in the case, we think we have no choice but to reverse the judgment of the Court below, and to order the plaintiff's suit to be decreed. I should add that, in respect to a portion of the land in dispute, which is said to consist of 1,000 beeghas out of the 21,000 and odd beeghas in the whole chur, it appears that that is in the actual cultivation of the defendants. The plaintiff's vakeel, in arguing the case, stated that it was not the desire of the plaintiff to obtain khas possession of such land by means of this decree. We think, therefore, that the decree should be limited to putting the plaintiff in possession of her rights as zemindar, so that she should be enabled to collect rents from all occupying ryots, and that any question as to lands held by the defendants in person should not be affected by the present decree. As to the costs, we think that regard being had to the plaint, to the finding of the Judge in respect of which we see no reason to differ as to what took place in the measurement, the suit should be decreed without costs in the Court below, but the plaintiff should be entitled to her costs of the present appeal.

The 12th June 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Sale of Estate—Recovery of Purchase-money—Register of Mutations.

Case No. 1735 of 1875.

Special Appeal from a decision passed by the Judicial Commissioner of Assam, dated the 21st May 1875, affirming a decision of the Officiating Deputy Commissioner of Durrung, dated the 2nd April 1875.

Gedeera Kolita (Plaintiff), *Appellant,*

versus

Debendro Narain Konwar (Defendant), *Respondent.*

Baboo Roop Nath Banerjee for Appellant.

Baboo Bykunt Nath Doss for Respondent.

Where a person purchased certain lands under a deed of sale, in which the vendor undertook to apply to the Revenue Authorities for the transfer of the lands to the name of the vendee, and did so, and both persons clearly understood what they were doing, HELD that the refusal of the Revenue Authorities to enter the purchaser's name in the mutation-register did not constitute a ground for cancelling the sale, and recovering the purchase-money.

Macpherson, J.—WE cannot interfere in this case.

The suit is brought to recover the purchase-money paid for certain lands sold by the defendant to the plaintiff, who complains that his name has not been registered in the Collectorate, and that possession has not been given to him as agreed.

Both the lower Courts have dismissed the suit. The Lower Appellate Court finds that the defendant did not act in bad faith or intend to give a wrong description of property sold; that the plaintiff examined the land before he concluded the purchase and knew thoroughly what he was buying; and that the refusal of the Revenue Authorities to register the name of the plaintiff in lieu of that of the defendant is no ground for instituting this suit.

The bill of sale executed by the defendant is to the following effect: ". . . " have sold to you, for Rs. 1,698, 35 beeghas, " &c., homestead lands; 345 beeghas, &c., " turable lands; 6 beeghas, &c., *farm* " lands; and 568 beeghas jungle lands, " 955 beeghas, &c., in all, as well as " beeghas, &c., taken on the occasion of " survey-measurement in exchange of " of other mouzahs, &c., in all 1,000 beeghas " numbered 249 in the *Towzee*, and all " in mouzah, &c., standing in my name, " settled with me for twenty years in " at half rate, bearing sudder jumma " Rs. 65-1-10. I have this day applied " the registration of your name. I therefore " give this writing that you continue to " uninterrupted possession of the said " from generation to generation by gift " your name registered and by being entitled " to alienate, &c. . . ."

The plaintiff taking under such a bond as this, knowing what he was buying, and being content with the defendants having applied for mutation of names in the Collectorate, it seems to me that he is not entitled to cancel the contract and demand back his purchase-money, merely because difficulties have occurred in getting the transfer of names completed. The plaintiff chose to buy and to pay the purchase-money before the exchange of lands had been actually effected, and before he knew whether the Revenue Authorities were prepared to register his name in the manner proposed by him. Having done so, it is for him to take such steps as may be necessary

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in full possession. Of course the is bound to render all assistance in er.

appeal is dismissed with costs.

ris, J.—I concur. It is found as a at the plaintiff knew perfectly what doing when he contracted to buy the ty, and that there was no misrepre- on of fact or of boundaries on the part defendant. The Survey Authorities ready measured off the 44 beeghas which they proposed to add to the estate in exchange for detached lands equal amount elsewhere. Their pro- to this effect had been submitted to nment, but not yet acceded to, when aintiff agreed to take the entire 1,000 as of which these 44 beeghas odd d a part, and paid down the money. e day that the deed of sale was exe- and the money paid, the defendant the necessary application to the Collec- register the property in the name of aintiff. He, the defendant, thus did all t was incumbent upon him to do, and at the plaintiff thought it necessary for to do. In this state of things, the quent refusal of the Collector to register roperty in the name of the plaintiff was tingency which neither party appears e contemplated or at least provided for e deed of sale. It may be, as the Judi- Commissioner says, the arrangement that detached lands should be given in vent of Government not giving up the eeghas odd asked for. At any rate the dant is in no way to blame for the al of the Collector or for the conse- ces attendant upon such refusal. The iff took the property on the understand- that defendant would apply for registra- ; and, as the defendant did this, he, the iff, must suffer the consequence of ing a premature bargain.

The 7th March 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Partition—Separate Use of Portion—Private Agreement.

Case No. 192 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 13th May 1874.

Baboo Lalljeet Singh and others (Defendants), *Appellants,*

versus

Baboo Raj Coomar Sing (Plaintiff), *Respondent.*

Mr. M. M. Ghose and *Baboo Chunder Madhub Ghose* for Appellants.

Mr. Branson and *Moonshee Abdool Baree* for Respondent.

Where an applicant for the partition of a joint undivided estate holds any portion of it for his own private use under a private agreement, HELD that the whole estate, including such portion of it as has been separately enjoyed, must be brought into account before the partition can be effected.

Jackson, J.—THIS is a suit by a son, being a Hindoo subject to the Mitakshara Law, for partition. The defendants are the father of the plaintiff, a brother of his who appears to be a minor, and the mother. The plaintiff first brought a suit against his father and brother only for partition of the same property as far as the immoveable

property was concerned, in which he alleged that he was entitled to a one-third share, and he obtained a decree accordingly in the District Courts; but, on special appeal, the case coming before a Division Bench of this Court, it was held that the mother was a necessary party; that the plaintiff was not entitled to the one-third share he sued for in that suit; and his suit was dismissed, but without prejudice to his right to bring a fresh suit making all the interested persons parties thereto. The present suit is the consequence of that decision. The claim in the present suit has been very greatly swollen by the inclusion of moveable property, houses, and so forth, bringing the value of the claim from something below Rs. 5,000 to Rs. 12,432. The suit was heard by Baboo Muthoora Nath Goopto, the present Subordinate Judge of Bhaugulpore, who framed the following issues: *first*, whether or not section 7 of the Civil Procedure Code bars any portion of the suit; *secondly*, whether or not the plaintiff has relinquished his right to demand partition; *thirdly*, whether or not the plaintiff has a right to demand partition of personal property; *fourthly*, whether or not the plaintiff is in possession of any personal property; and, *fifthly*, whether or not the plaintiff is entitled to partition free of religious charges. As to the personal property; we may dismiss that part of the case by saying that in the judgment of the Court below, which is not seriously disputed here, the evidence of both sides has been held to be of no value at all, and, therefore, that part of the case may be fairly put out of the question. As to the religious charges there is no serious question either, and we do not think it necessary that our judgment shall refer to that part of the case, nor has the appellant here raised any question as to section 7 of the Code of Civil Procedure. The second issue framed by the Court below originated in the third paragraph of the defendants' written statem which is in these words: "The plai "has no right for getting partition of "property mentioned in the plaint. "plaintiff has relinquished the claim reg "ing partition during the life of the defe "ant No. 1. One Mouzah Jeojleapur, toge "with kamat land, has been given to hi "his personal expenses, and is still held "him." No doubt that paragraph may read as meaning that the plaintiff has dep ed himself of the right of partition by act of relinquishment which the defend seemed prepared to prove by the produc of a chitta, dated the 1st Cheyt 12 printed at page 15 of the paper-bo Regarding this chitta in the light of formal instrument of relinquishment, Subordinate Judge held that it came wi the purview of section 17 of the Regis tion Act of 1866, and that for want registration it was not receivable in evide and this decision of the Subordinate Ju affects to a considerable extent the o parts of the case, because, when it was prop ed to ask the witnesses for the defend any question relating to the grant of villages to the plaintiff for his mainten and the like, such questions were stopp by the Court as relating to a matter respect of which an arrangement had be come to between the parties under a writ agreement. The result is that evidence to some material points has been shut o by the course taken. It appears to us, a as far as we can see the Court below al came to the conclusion, that Mouzah Jeojle pur had, in fact, been made over to th plaintiff, and remained in his possession from the time when the litigation commenced. It is also admitted in our presence by both parties that this mouzah is an ancestral property, and the learned Counsel for the appellant, who represents all the defendants to the suit, likewise states that the mouzah

which are shown both by this chitta and by the petition of the defendants, printed at page 19 of the paper-book, to have been made over to the younger brother for his maintenance, are also ancestral properties. We have no doubt that in order to entitle plaintiff to partition of the ancestral properties, he shall have to bring into hotchpotch also that portion of the ancestral property which, by the previous arrangement, is in his hand for the purpose of his separate use. Considering the judgment recorded in this case at the previous trial by the Division Bench of this Court, and considering the arguments before us to-day, we see no reason to doubt that, as a matter of law, the plaintiff is entitled to a fourth share of what he claims in the joint ancestral property; but we are also of opinion that the decree should not have been given to him for that fourth share without taking a strict account of the whole joint ancestral property including that which has been in his possession. We think, therefore, that the decree of the Court below should be so far varied as that the whole property should be taken into account, and there should be an inquiry as to the extent and value of that property, and, upon that being ascertained and determined, there should be a proceeding for coming to a partition. This must also include the two mouzahs which appear to have been made over to the younger brother. The whole should be brought into account, and the share of the plaintiff must be given to him after taking all into consideration. As the defendants have not desired that their separate shares should be defined and ascertained, it will not be for the Court to do that. The question remains as to the costs, and as to that the order that seems to us proper to make is that the plaintiff in this case should bear his own costs throughout, and pay two-thirds of the costs of the defendants, leaving the father to pay the remainder of such costs.

The 25th April 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Separate Enjoyment of Share.

Case No. 204 of 1874.

Regular Appeal from a decision passed by the Judge of Midnapore, dated the 29th July 1874.

Joy Narain Giri (Plaintiff), *Appellant,*

versus

Goluck Chunder Mytee, father and guardian of Grish Chunder Mytee, minor, and others (Defendants), *Respondents.*

Messrs. J. T. Woodroffe and *R. T. Allan* and *Baboos Kalee Mohun Dass* and *Ram Churn Mitter* for Appellant.

Baboos Mohinee Mohun Roy, Umbica Churn Bose, and *Bhowanee Churn Dutt* for Respondents.

Where the surviving sharer in an estate sought to be put in possession of his co-sharer's portion, as manager on behalf of the latter's widow, on the ground that, though the deceased co-sharer had made efforts to reduce his share to distinct possession, those efforts had not been completely successful when he died, and he could not therefore be said to have had a separate enjoyment of the said share, HELD that, as the deceased co-sharer had done all that was possible to obtain separate possession, and it was only the opposition of the plaintiff that has obstructed him, it would be

allowing plaintiff to benefit by the wrong he had done to give him possession; and that the share of the deceased co-sharer must be held to have passed to those to whom, though not his immediate heirs, he had been taking steps, when he died, to devise the possession of it.

Jackson, J.—THE questions to be determined in this appeal are: *1st*—Was Shib Proshad and are the members of his family subject to the law of Mitakshara or of Bengal? *2nd*—Was Shib Proshad, at the time of his death, legally separate in estate from Joy Narain or not? *3rd*—Did he make the will propounded in favour of his sister's son? *4th*—Is that will operative? *5th*—Ought the plaintiff to be put in possession as manager or otherwise? We think on the first issue, though the evidence is not of the most satisfactory kind, that the family is shown to be governed by the Mitakshara. It appears to have migrated from the south, and the district of Midnapore being border land, the probabilities are in favour of this view. The Judge was of this opinion, and we see no reason to differ from him. On the second question, it is clear that Shib Proshad had been, for some years since 1272, separate in food, and had left his paternal home on account of his cousin Joy Narain's ill usage and denial of his rights. He brought a suit eventually to establish these rights, in which he was successful, though it was contested by Joy Narain up to the Privy Council. He seems to have taken refuge with his sister's husband, Goluck Chunder Mytee, the father of the infant Grish Chunder, and to have been assisted and supported by him while the litigation continued. He applied to execute his decree, but this application was resisted by Joy Narain, and while the appeal to England was pending, Shib Proshad died, and Joy Narain at that time applied to the Court to have Shib Proshad's widow, Taramonee, put on the record as respondent, alleging her to have succeeded by right of inheritance. An order was eventually in favour of Grish Chunder Mytee, his father Goluck Chunder. Shib P thus endeavoured by all means in his to reduce to possession his distinct share divided or undivided; he sep himself in food from his unjust kin he incurred expenses on his separate acc and, finally, he did what he could to tra the specific share to one near in blood, th not his immediate heir. But it is said he never reduced his share into posse that separate enjoyment is essential, separation with its legal consequences e established. We have been referred t following cases, amongst others, 5 We Reporter, page 78; 9 Weekly Repo page 61; 12 Weekly Reporter, page As to the case in 5 Weekly Reporter, is just one of the class of decisions w are overruled by the judgment of the J cial Committee in Appovier's case, Moore, page 92. In 9 Weekly Repo it was held, no doubt, by the late Mitter that the Court would not consider th had been a separation unless there had enjoyment of the several shares. that was a very different case from present, and we may be quite sure that a and able Judge would never have allo the plaintiff to profit by such a plea w the deceased co-owner had not me declared his intention, but done every th that lay in him to carry it out, and w the failure to do so was entirely the re of plaintiff's own determined opposit That, as the District Judge observes, wo be to allow the plaintiff to benefit by own wrong. The case in 12 Week Reporter was a certificate-case, and we thi the decision inapplicable. Mr. Woodroff indeed, threw it out that Shib Proshad migh have chosen to live jointly with the plaintiff but Joy Narain, cynical as he has been throughout, never ventured, in his lengthy

to make any such suggestion. It is at, if we hold Shib Proshad to have legally separated, we shall be going l Appovier's case, a thing which ought be done; but we think that is not so, at we are merely applying the prin- f that case to one in which the Judicial ittee would have applied it themselves. moreover, we think it pretty clear that, time of Shib Proshad's death, Joy himself regarded him as separate in otherwise a man so keen, as he stly is, would never have informed ourt that the widow had succeeded, ould himself have jumped at the suc- n. We hold, therefore, that in this here was separation in estate between Narain and Shib Proshad; and that, the decision in favour of the latter, Narain knew himself to have been hold- n severalty. Our determination of this would be enough to put the plaintiff f Court, but we think it will be well to an opinion on the points which remain. the will, we agree with the District that it was really made by Joy in, and that he made it with all his about him. There is no reason to lieve such of the subscribing witnesses ve been examined; and the Sub-Regis- testimony, which is, of course, above spicion, is strongly corroborative of the for the will. It is said that all the sses have not been examined, nor has absence been accounted for. But the els of the Midnapore Court are doubt- better acquainted with principles of tive law than they are with the correct e of presenting a case, and it probably r occurred to them that it was necessary o more than examine such witnesses as ld suffice to prove the document. It t be borne in mind too that what Shib shad is said to have done is just what the circumstances he would be likely to do. He had carried on a lifelong struggle with his cousin, and had only succeeded after years of litigation, and at the cost of much money, labour, and anxiety, in establishing his own rights. Could he see, without anxiety, his affairs pass into the hands of three helpless females, his wife, mother, and daughter? Is it not probable in the highest degree that he would take a step which would not only convey the property to a male descendant, but would ensure the active support of Goluck Mytee, who had already been for long his mainstay, and who was in circumstances to carry on any further contest that might be necessary; and, lastly, this instrument has the assent and acquiescence of those who would otherwise be the immediate heirs, and, but for the will, would now take the estate. We think also that this instrument must have full effect; it is, in fact, a will, a disposition of property to operate on and after the death of the maker. It consequently required no stamp, and the failure to obtain registration is immaterial. But, even if this were otherwise, we should not easily be satisfied that it could be right to give the plaintiff possession as manager, and to place at his mercy in a certain sense the unprotected family of the man whom he did his best, through many years and many Courts, to keep out of his rights. This arrangement, if under any circumstances a necessity arose for putting the estate under management, would be the last that we should be inclined to sanction. In point of fact, however, the question does not arise. The infant is entitled, and his father is his natural and proper guardian and the best protector of his interests. The plaintiff's suit, therefore, failing upon all points, was, we think, properly dismissed, and this appeal is also dismissed with costs.

This judgment disposes of the miscellaneous appeal No. 296 of 1874, which we regret having kept so long in abeyance.

The 3rd May 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Partition—Rectification of Partition.

Case No. 1647 of 1875.

Special Appeal from a decision passed by the Additional Judge of Backergunge, dated the 1st June 1875, affirming a decision of the Second Moonsiff of Madareepore, dated the 30th December 1873.

Tripoora Soondaree, for self and as guardian and stepmother of Chunder Kant Roy and others, minors (Defendant), *Appellant,*

versus

Gopal Nath Roy (Plaintiff), *Respondent.*

Mr. J. T. Woodroffe and *Baboo Kashy Kant Sen* for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondent.

Where a member of a Hindoo family, which had once been joint, claimed to be put in possession of a certain portion of the estate of which he complained he had been dispossessed during minority, and the opposite party denied the reality of the partition under which the claim was advanced, and urged that an earlier partition had taken place in which plaintiff's father had acquiesced, HELD that a person, on attaining to majority, could not contest an arrangement in which the person from whom he inherited had during his minority acquiesced; and that, where a property had been divided, and one of the sharers was dissatisfied with the result, he could bring a suit to have the division entirely revised, but was not at liberty to ask for a rectification of a small portion of the divided property.

Jackson, J.—THE present suit is brought by the plaintiff Gopal Nath Roy, who was a member of a Hindoo family which had been joint, against certain other members of the same family. The suit was valued [illegible] 80, and was designed to obtain poss[illegible] a certain share of the land and tanks [illegible] taining to Bagbari, the specific p[illegible] the plaint being to obtain possession [illegible] 1 anna 6 gundas 2 cowries 2 krants [illegible] of the lands Nos. 1, 4, 5, 6, 7, and 9, a[illegible] tank No. 10 stated in the map. The p[illegible] iff also declared his intention of bring[illegible] separate suit for wassilat. The [illegible] alleged that a division of the joint [illegible] which this claim relates had taken pl[illegible] Kartick 1271, and that, while he (pl[illegible] was a minor, and at which time the d[illegible] ant No. 9, Dinonath Roy, his brother, [illegible] been his guardian, the whole of the [illegible] cipal defendants had taken possessi[illegible] the land in collusion with each other, a[illegible] had been dispossessed from the land a[illegible] tanks. He stated that he had attaine[illegible] majority shortly before Bysack 1277, [illegible] he then attempted to take possession of [illegible] he considered to be his proper share, [illegible] that he was resisted by the defendant.

In answer to this claim, the defe[illegible] principally affected being Tripoora S[illegible] daree, the wife of defendant No. 1, R[illegible] Kant Roy, who, we understand, is dead, [illegible] her written statement, in which it was [illegible] forth that no such butwara as that sp[illegible] of by the plaintiff had taken place in 1[illegible] that long before, *viz.*, in the year 1233 [illegible] private partition of the said 8-anna s[illegible] had been made, and that the parties c[illegible] cerned had been in possession of their sev[illegible] shares in accordance therewith; and t[illegible] defendant also alleged that she had acqui[illegible] a part of this property by purchase from h[illegible] husband sometime before this suit, and h[illegible] expended a large sum of money in improvi[illegible] the land, excavating a tank, and so forth.

The Moonsiff framed three issues—*first,* a[illegible] to misjoinder; *secondly,* as to possession, and [illegible] connected with that, as to general limitation; and, *thirdly,* as to whether the plaintiff w[illegible]

entitled to the share which he claimed. Afterwards there was an additional issue on the ground of special limitation.

The Moonsiff found upon the evidence that the butwara of 1233 set up by the defendant was not proved, that that document, as also a certain kobala by which the property passed to the defendant, Tripoora Soondaree, from her husband, and in which a previous kobala was recited, was collusive; and he found that the butwara of 1271 was true. He considered, in answer to the objection of the defendant, that the plaintiff was at liberty, if he thought fit, to repudiate the butwara entered into by his guardian; and being of opinion that the plaintiff had not been at all fairly dealt with in that butwara, he gave him a decree for part of his claim.

On appeal, the Additional Judge, Mr. Harris, although he does not concur with the Moonsiff on all points, has, in fact, affirmed the judgment of the Moonsiff, and has dismissed the appeal with costs.

It appears to us that the judgment of the Additional Judge is not based upon proper judicial grounds, and that it contains errors of various kinds which are altogether fatal to its being maintained. The main question of fact with which the Lower Appellate Court had to deal, was the allegation of the plaintiff as to the partition come to in 1271, and the counter-allegation of the defendants that the previous butwara, in which the interests of all the parties had been fully dealt with, had taken place in 1233. It is clear that, if there had been a partition in 1233, that would in itself go a long way to disprove the plaintiff's allegation regarding the subsequent one in 1271, and that circumstance, it seems, drew the attention of the Moonsiff, because he says in his judgment at page 13 of the printed paper-book: "Now, if the partition-deed of 1233 had been a true one, I do not find any reason why there would be a second partition in 1271." The Judge, being of opinion that the partition of 1271 was sufficiently proved, as he calls it, lays aside as unimportant the inquiry as to whether that of 1233 took place or no; and further he says that, even if it did take place, it was not acted upon by the parties or was superseded by the later arrangement of 1271. But that was not the case of either party. It was not the case of the plaintiff, because the plaintiff denied altogether the transaction of 1233, alleging that partition of the family-property had taken place in 1271. It was not the case of the defendants who alleged possession under the partition of 1233. Therefore, in order to determine this question, it was highly necessary to inquire whether the partition of 1233 had taken place or not; and then, in respect of this partition of 1233, there was a very important circumstance which the Judge deals with as of no importance at all. It is the existence and the execution of a deed between the defendant Tripoora Soondaree, and her deceased husband, Rukini Kant, in 1264, in which the previous butwara of 1233 was recited. Now it is clear that, if that kobala was really executed in 1264, there must have been at all events in existence, and therefore not devised or brought forward for the first time in reference to this suit, some transaction of an antecedent date, probably of 1233. The Judge puts aside this transaction, simply observing that it was between the husband and the wife. Now, if the husband and the wife played into each other's hands, it is very strange it should have been so long back as the year 1261, some sixteen years before the present suit. It was, therefore, very necessary for the Judge to find whether this kobala of 1264 was executed or not, and what makes it still important is, that there was the signature of the plaintiff's father as subscribing and consenting thereto. It is impossible to conceive anything stronger

than that if the document is genuine. Then there is a circumstance to which the Judge refers as being against the earlier butwara. He says: "The survey-map does not show that there had been the butwara referred to." It is not suggested before us that the survey-map in any way shows the existence of the butwara, and further the Judge remarks that "the absence of defendant No. 1 is not material for the plaintiff's side," and he seems to think that the defendant might have appeared, because his illness was not of such a nature as to render the giving of his evidence impossible. It is stated in an earlier passage of the judgment that "a medical certificate, dated 29th August "1873, was produced, stating that defendant "No. 1 was under treatment for melancholia "for one month previous," and we are told that the defendant was in fact suffering from a species of madness, and that he has since then died. It was unlikely, therefore, that the defendant could have been produced, or even, if produced, that his evidence would be of any service to either party. Then, in dealing with the butwara of 1271 and its legal effect, and the question of the plaintiff's right to sue and set it aside, the Judge commits what is a still more serious mistake. He seems to think in the first place that the butwara, although solemnly executed between all these parties, was not intended to be perpetual; and the pleader, who appears before us to-day in support of that observation of the Judge, points out that the document contains no term or expression by which the heirs of Dinonath would be bound. We see no force in this argument. If parties choose to come together and voluntarily divide any property common to them, the shares so divided cannot, in any way, come together, unless the parties choose to re-unite and bring them together again, so that if the specific partition of 1271 is true as alleged by the plaintiff, it must be regarded as being a final and conclusive partition. The Judge considers that, because the pl was at the time a minor, he is not bou it. He says: "Under any circums "it is not necessarily binding, now th "minor has come of age. It is not un "sary therefore, to consider whether, "arrangement itself had been of a perp "or continuing nature after the "attained his majority, the act of the "dian, defendant No. 9, would by la "binding upon the plaintiff. The plain "now entitled to assert his right in "whole land, if he does not wish the "wara-arrangement to continue:" so in the Judge's view, when the members family have met together and determi upon a division of the family-property, happens that one of them is not of age the time when the partition is come to, h at liberty, when he comes of age, to co into Court, and ask to have the document aside. It is not suggested that his broth defendant No. 9, who acted for him d his minority, acted at all in bad faith, no it suggested that the interests of the mi were sacrificed. By what took place seems that he simply prefers a differ arrangement. This particular point, ho ever, was not made an issue in the Moonsi Court, and it seems possible that the plaint might have been prejudiced by the omission the Moonsiff to frame an issue on that poi and on that account we might possibly b disposed to remand the case in order that issue might be raised and tried; but, pointed out by the learned Counsel for th appellant, that course, we think, is unneces sary, because the plaintiff's suit is for another reason bad on the face of it. It has been frequently held in this Court, and with obvious reasonableness, that where a property has been divided, and one of the parties affected by the division complains of what has been done, he is not at liberty to ask the

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o order the rectification of a small of the property so divided. If the ment is not to be carried out as it it must be entirely revised, that is, the of the property divided must be again t before the Court, and there must be ion *de novo* of the property in its y. What the plaintiff seeks here is e be put in possession of certain speci- tions of the property, not that there -division of the whole. For all these we think that the suit was bad; that aintiff really had no proper cause of ; and that the judgments of the Courts were erroneous, and must be set aside all costs.

The 3rd May 1876.

Present:

Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

-chitta—Stamp-duty—Balance of Account.

Case No. 1598 of 1875.

ial Appeal from a decision passed by Subordinate Judge of Dacca, dated 27th April 1875, affirming a decision the Sudder Moonsiff of that District, ated the 28th August 1874.

onjo Mohun Doss and others (Plaintiffs), *Appellants,*

versus

Krishna Chunder Shaha and others (Defendants), *Respondents.*

boos Rash Beharee Ghose, Hem Chunder Banerjee, Nullit Chunder Sen, and *Gooroo-doss Banerjee* for Appellants.

aboos Chunder Madhub Ghose and *Huree Mohun Chuckerbutty* for Respondents.

A hât-chitta, drawn up by only one of two parties to money-transaction, and purporting to represent the balance of accounts between them, but not assented to in any way by the other party, is not such a document as is contemplated by article 5, Schedule II. of the General Stamp Act, and does not require to be stamped.

Jackson, J.—THE plaintiff sued to recover Rs. 757-7½ annas, including interes entered in a hât-chitta, and he produced an account-book, each leaf of which contained accounts of separate persons with entries of debit and credit; and in the particular instance the account was made up by the plaintiff, after payment of a sum of money as stated in the plaint from the 26th Assin 1279. The defendant's signature is shown in the margin at the top of the leaf, in which this account appears, and we may assume at present, although no evidence has been taken on that point, that the defendant's name was there signed. The suit was, in the first instance, dismissed by the Moonsiff, on the ground that the wrong party had sued. The Judge reversed that judgment and ordered a trial on the merits, at the same time throwing out the suggestion that the hât-chitta referred to in the plaint not being stamped, the suit was liable to be dismissed on that ground. On that ground accordingly the Moonsiff has dismissed the suit, holding that the hât-chitta should bear a one-anna stamp; and, as it is not stamped according to law, the stamp-duty cannot be made up and the hât-chitta admitted. On appeal this judgment has been affirmed by the Subordinate Judge, Baboo Bhooputy Roy, who held expressly that the hât-chitta produced was a note or memorandum of accounts expressing the debt or account to be balanced, and that it came under article 5, Schedule II. of the General Stamp Act; and we are now asked to decide whether this view of the case is correct. We think it clear that article 5 of the second Schedule applies to cases where any account, debt, or demand, or any part thereof, amounting to Rs. 20 or upwards, is expressed

to have been balanced and assented to by both parties. The Legislature could never have intended that, because the plaintiff looked up his account, and added up what he found to be the balance, that should amount to a memorandum binding the customer, and, in that sense, should be used against him, and should, therefore, be liable to stamp-duty. We think, therefore, that the entry in the hât-chitta was not a memorandum of that description and did not require to be stamped. At the same time there is nothing clearer than that the plaintiff, whose advisers appear to have blundered in the most singular fashion in the suit, has very much misled the Court, because in the plaint he describes the suit as being one for recovery of Rs. 757-7 annas including interest entered in a hât-chitta, and then speaks of the hât-chitta book being used by the defendants according to the usage of the banking transaction. He then says, "I am duly entitled to the sum under claim after deducting the money paid by them," and in that way suggests the inference that it was a balanced account between the parties, which, if true, would make the document liable to stamp-duty. There is no doubt that, in the judgment of the Moonsiff, the case was looked upon as based on the hât-chitta; but we think, if the plaint be carefully read, it discloses facts upon which the plaintiff would be entitled to recover, notwithstanding the misleading expressions used. As the plaintiff himself very much contributed to the mistake of the Court, we think he quite properly had to pay and should pay all his costs of the Courts of Appeal, and also should properly suffer the loss or penalty which he had to pay to the Court under misapprehension by way of stamp-duty.

We cannot dismiss this matter without remarking upon the extreme inconvenience of the course taken by the Court below in this case. The Subordinate Judge, having this appeal before him in the first inst and finding that an error had been com by the Moonsiff, suggests another gr upon which the suit of the plaintiff mig got rid of. Now, that was either a ground or not? If it was a valid grou ought not to have sent the case bac trial, but ought to have adjudicated upo point himself. If it was not a valid gr he ought not to have suggested it t Moonsiff as a reason for throwing out suit. The Moonsiff unfortunately follo the suggestion of the Subordinate Judge, dismissed the suit; and the result is although the case has been heard twice the original Court, twice in the Lower Ap late Court, and once in this Court, the dence has yet to be taken. The case go back to the Court of first instance to tried on the merits.

It is obvious that, in this case, there no acknowledgment by the defendant. T defendants' name merely appears at the of the hât-chitta in accordance with com usage.

As already observed, the plaintiff will his own costs of the Appellate Courts if the ultimate decision be in his fav The other costs of the suit will follow result.

The 9th May 1876.

Present:

e Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

dibility of Witness—Question of Fact.

Case No. 1825 of 1875.

l *Appeal from a decision passed by Additional Judge of Backergunge, d the 23rd June 1875, reversing a sion of the Moonsiff of Maudaripore, d the 8th September 1874.*

obin Chunder Pooshalee (Plaintiff), *Appellant,*

versus

ngo Chunder Chatterjee and others (Defendants), *Respondents.*

boos Mohinee Mohun Roy and *Bykunt Nath Doss* for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

ere a certain property was alleged to have been n two occasions to two different persons, and the on arose whether, in both, the purchasers had acted *fide* or only one was a genuine sale, and the Moon- cided on the evidence that the sale over which the iff made his claim was genuine, and the other ous, but the District Court reversed the judgment, e ground that the evidence on the other side was trustworthy, HELD that, as the plaintiff's witness- d impressed the Moonsiff as being trustworthy, the ict Court was not at liberty, unless there were very reasons for so doing, which there were not in this to reverse the Moonsiff's decision on a question ct.

ackson, J.—THE plaintiff in this suit ght to recover possession of a fractional re of a certain talook, which he alleged nself to have purchased from the defendant, ngo Chunder Chatterjee. He alleged that, proceeding to take possession of his pur- sed share, he was opposed by the defen- nts generally, the defendants 2 to 5 being, he said, in collusion with the defendant, ndor.

The defendant, Bungo Chunder, made no answer, but the defendant No. 3, Anund Churn Chatterjee, put in a written statement, in which he alleged that the plaintiff's story of purchase and of going to take possession was false; that the defendant No. 1 had sold a larger share than that claimed by a plaintiff to him (defendant No. 3); and, as it appeared that the kobala under which this defendant claimed had been registered considerably after that set up by the plaintiff, it was alleged that the defendant No. 1 had been ill, and could not effect registration, and so the delay in getting his kobala registered had taken place. The defendant also alleged that he was at enmity with the plaintiff and with the defendant No. 1, and that the suit was the result of collusion between plaintiff and defendant No. 1.

The suit was tried before the Moonsiff of Maudaripore, who framed these issues: "Whether plaintiff or the answering defend- "ant is the *bonâ-fide* purchaser of the pro- "perty in dispute; whose purchase is valid, "if both be held to have purchased the pro- "perty in good faith?"

On the first issue, the Moonsiff found very decidedly in favour of the plaintiff. He found that the plaintiff had in good faith entered into the contract of purchase and sale with the defendant No. 1, and he found that the evidence adduced by the defendant was good for nothing as he says. That being so, the second issue, of course, was equally found for the plaintiff, and a decree was given accordingly.

An appeal from this judgment was heard by Mr. Harris, the Acting Additional Judge of Backergunge. It is not easy by any means to discover on what definite ground the Additional Judge has proceeded in reversing, as he does, the judgment of the Moonsiff. After reciting in a somewhat rambling way the different allegations and statements of the witnesses, he begins by

saying: "The plaintiff adduced four "witnesses in support of his kobala, and I "certainly think that their evidence is as "reliable as that of the defendant's wit-"nesses." A few lines further on he says: "In such a case as this where the decision "rests upon the preference given to the "witnesses on one side or the other, I think "the Moonsiff has not given sufficient reason "for preferring the plaintiff's evidence to "that on behalf of the defendant." Now, where the Moonsiff had, after having the evidence on both sides before him, preferred that of the plaintiff, it is clear that, from the nature of the evidence given by the witnesses, the testimony of the plaintiff's witnesses had impressed the Moonsiff's mind more favourably than that of the defendant's; and the circumstances of the case are not far to seek which would suggest very good reasons for believing those witnesses. But, be that as it may, the Moonsiff having come to that conclusion, the Lower Appellate Court was not at liberty, unless there were very good reasons for so doing, to reverse the decision of the Moonsiff upon a question of fact. He was not at liberty to reverse the judgment of that officer upon a mere question of testimony, because the reasons given by that officer did not satisfy him. The Judge goes on to say: "Neelambur, one of the plaintiff's witnesses, "was defendant's first servant, defendant "No. 1 being related to, and living in the same "house with, defendant No. 3. I am inclined, "therefore, to place some weight on Neelam-"bur's evidence, there being no evidence of "collusion between defendant No. 1 and "plaintiff; on the contrary, the former sup-"ported the defendant's kobalas before the "Registrar." The Judge's reasons are exceedingly inconclusive in themselves, and, if anything, they favour the plaintiff's case rather than the defendant's. We regard his decision as being exceedingly unsatisfactory and set it aside, and remand the case to the Lower Appellate Court in order for a decision on the evidence. The plaintiff have the costs of this appeal.

The 9th May 1870.

Present:

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Fraudulent Sale—Service of Notice—Re-conveyance.

Case No. 1894 of 1875.

Special Appeal from a decision passed the Officiating Additional Judge of 24-Pergunnahs, dated the 31st May 18 reversing a decision of the First Mu siff of Baraset, dated the 20th Au 1874.

Gobind Chunder Mookerjee (Plaintiff), *Appellant,*

versus

Ram Komul Chatterjee and others (Defendants), *Respondents.*

Baboo Umbika Churn Bose for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

Where immoveable property of considerable value had been sold for Rs. 11 in a sale in execution of a decree for Rs. 17-11 annas, and purchased benamee by the execution-creditor in the name of a relative, and

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found that the judgment-debtor had not ormed of the sale, HELD that all these ances taken together justified a suspicion of at dealing, and that the judgment-debtor was o recover his property on payment of the ori-e.

fixing of a notice of sale in a not very con- part of the land, when the judgment-debtor a different district, is not sufficient to satisfy irements of justice.

ison, J.—WE are unable to concur in se with the judgment of the Lower ate Court. The circumstances on the plaintiffs relied to establish fraud ollusion against the defendants were and it appears to us that the Judge her taken those circumstances one by nd dismissed them as not severally and ely amounting to fraud, whereas he to have considered them collectively, en whether, taken together, and with nce to one another, they did not amount act of fraud such as is set up. In lar we may refer to what the Judge n regard to the individuality of the ser—one of the circumstances strongly upon by the plaintiff was, that this ty had been purchased in execution judgment-creditor himself, but in the of a connection. The Judge appears hit that the purchase was, as contended e plaintiff, a benamee purchase. He "The relationship between the ndants is not denied, but it merely cates the benamee nature of the pur-e, not that the proceedings in execu- were fraudulent." No doubt, taken elf, it could not show that the proceed- were fraudulent, but, when taken with act that no notice was served on the ment-debtor, and, with the other facts of ase to which we shall presently refer, ircumstances seem very strongly against *nd-fide* sale. It was said that in tion, where immoveable property was erned, it was not necessary to serve the notice of attachment personally on the judgment-debtor, but that it was sufficient if the notice were served on the land—the notice being an order not to part with the property. Now, this is very well if the judgment-debtor be residing on the land; but, where the judgment-debtor, as in this case, not only does not reside on the land, but in a different district altogether, it is clear that the affixing of a notice in a not very conspicuous part of the land is not sufficient to satisfy the requirements of justice. It seems to be almost certain from the circumstance that immoveable property of a considerable value had been put up to sale for the small sum of Rs. 11; that the judgment-debtor was not aware of what took place. Besides, the sale of the whole of the property in one lot was not at all fair to the debtor, and to this may be added the further circumstance which casts suspicion on the whole proceedings that the execution-creditor, having effected this purchase in the manner described, took no steps to get into possession of the property until he was obliged to intervene in a suit brought to recover rent. It appears to us that the Moonsiff was right in taking all these circumstances in the aggregate and finding therein a sufficient case of fraud; and that the Judge, in dealing with the circumstances one by one and in not regarding them as a whole, has departed from the judicial principle of inquiry, and therefore his judgment reversing that of the Moonsiff is erroneous, and must be set aside with costs. The defendant should re-convey to the plaintiff this property upon the plaintiff paying the former due, Rs. 17-11 annas with costs. The purchase-money is to be restored.

The 12th May 1876.

Present:

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Res Adjudicata—Nemo debet bis vexari pro eadem causa—Improper Conduct of Pleader.

Case No. 2252 of 1875.

Special Appeal from a decision passed by the Officiating Additional Judge of the 24-Pergunnahs, dated the 31st August 1875, reversing a decision of the First Moonsiff of Alipore, dated the 26th May 1874.

Gunga Ram Sadhookhan (Defendant), *Appellant,*

versus

Panch Cowree Poramanick (Plaintiff), *Respondent.*

Baboos Mohinee Mohun Roy and *Nil Madhub Bose* for Appellant.

Baboo Tarinee Kant Bhuttacharjee for Respondent.

Where the mother and guardian of minor sons had once sued a certain party in order to set aside certain kobalas by which she had conveyed away to him the property of her late husband, on the ground that her action may have been injurious to the interests of her sons, and the said suit had been thrown out by the Judge; and the sons subsequently brought another suit with substantially the same object in view, but making the mother a co-defendant with the original defendant: HELD that the validity of the kobalas having once been decided, the only ground on which the present suit could lie would be that the mother had, in giving the kobalas, acted collusively with the defendant, of which, however, there was no evidence whatever.

It having also appeared that, without any instructions to that effect, the pleader conducting the suit in the Lower Appellate Court had suggested of his own motion that the mother was a frail woman, and, being in improper intimacy with the defendant, had executed the kobalas for him: HELD that the pleader had with gross impropriety, and should be called to censured by the District Judge.

Jackson, J.—THE ground which been argued with our permission here which by some oversight was not inser the memorandum of special appeal, is this suit is really barred, both under sec of the Code of Civil Procedure, and under the general principle *nemo deb vexari pro eadem causâ*, the subject-m in the present suit being disposed of in decision of the previous suit recited by plaintiff himself in his plaint. The p sets out that the plaintiff's father di Srabun 1273, leaving the plaintiff age years and his brother aged 9 years; th defendant No. 1 dispossessed their m and took possession of their valuable p perty, on which she brought a pauper against the defendant; that, when the came on for hearing, the defendant produ two false and fraudulent kobalas, being very kobalas impugned in the present purporting to have been given by mother, one dated the 3rd Bhadro 1278, the other 3rd Bysack 1274. The plaint went on to urge that there was no diffi in respect of the maintenance of the min that the assertions with regard to the kob were false, and made simply to make plaintiff despair of getting back property. Then the plaintiff goes on:—

"Anyhow our mother did not give th "kobalas nor receive any money; and, wh "there was no want in our feeding "clothing ourselves, and more particula "when our father had no debt causele "contracted, we cannot be bound by th "kobalas, even if our mother, the defen "ant, had given them in reality, neither co "these kobalas remain valid." This suit was brought against the defendant (dispossess Gunga Ram Sadhookhan, and also agai

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obinee Dossee, mother of the plaintiff, rdian of her minor son, the plaintiff's est brother. Whether she should been sued in her capacity of guardian is open to question. She might be made adant if the allegation had been that d improperly conveyed the property other defendant, but the plaintiff hout asserts that the kobalas were executed at all.

defendant, Gunga Ram, put in as to the effect that the two kobalas een executed by the plaintiff's mother *fide* for valid reasons, and are now valid ood, and so forth. Before the Judge, ubt, a question appears to have been , although it is not quite evident how e, whether the sale by the mother had fraudulent and collusive. On that point, full evidence had been taken, the Judge to the conclusion that there was no ion of fraud against the mother. He went on to inquire whether the s had been executed for legal ity, and on that point he came to the usion that no real necessity existed. it is clear that the mother brought the suit in her capacity of guardian, and, interests of her minor sons, raised the question whether the property was yed to the defendant by the kobalas in dispute, and one of the issues raised whether the kobalas were valid in the of the law, because the mother, although proceeding would be singular, would ably be justified in raising the question ardian of her minor sons, whether her act had been consistent with the ests of her sons and consistent with the doo Law. Therefore the very identical tion which is now sought to be raised raised in the previous suit, and decided vour of the defendant. The only pos- e ground upon which the present plaintiff ld be entitled to raise it again would be if he alleged that the sale and the previous suit had all been carried on in collusion between the defendant and the mother. But nothing of that sort had been alleged in the plaint, and, although an issu ehad been framed, no evidence was forthcoming on that point. Without, therefore, going into the other points that arise in the case, it seems sufficient to say that, on the principle of *res judicata*, this suit is concluded and barred; and we are bound to say that, on a perusal of the plaint, we do not find at all the good faith on the part of the plaintiff suggested to us looking to what took place before.

There is one thing, however, which remains to be noticed. The Judge, in his second judgment after the remand, in a parenthesis makes the following statement: "The pleader did indeed make a suggestion "of her," *viz.*, the plaintiff's mother, "being "possibly a frail woman, and in improper "intimacy with defendant; but, on my ask- "ing if he was instructed to put forward "so improper an imputation, admitted he "had no instructions and no foundation "for it." We are unfortunately too much accustomed to see litigants put forward rash and unfounded imputations upon the conduct and character of their opponents in these Courts. This practice, not at all justifiable, may, at least, find some explanation in the animosity and struggle that is taking place between the contending parties, but it seems to us far worse, scandalous, and inexcusable that a pleader of the Appellate Court should, of his own motion, without any ground suggested, and without any instruction whatever, volunteer the shameful insinuation put forward in this instance. The name of the pleader does not appear. We desire that the Judge will ascertain from the record who the pleader was who argued the case before the Additional Judge of the 24-Pergunnahs, send for him in open Court, and

express to him this Court's extreme disapproval of the course adopted by him.

The judgment of the Lower Appellate Court is reversed, and the plaintiff's suit dismissed with costs.

The 12th May 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Suit for Possession—Adverse Possession—Limitation—Refund of Purchase-money.

Case No. 2263 of 1875.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 14th July 1875, modifying a decision of the First Subordinate Judge of that District, dated the 29th January 1875.

Rakhal Chunder Roy Chowdhry and others (Defendants), *Appellants,*

versus

Gopal Krishto Sen (Plaintiff), *Respondent.*

Baboo Doorga Mohun Doss for Appellants.

Baboos Grija Sunker Mojoomdar and *Issur Chunder Chuckerbutty* for Respondent.

Where a person purchased and leased portions of the property of a joint family without notice that there were contested rights and in the belief that the ve entitled to sell or grant a mourosee lease; representatives of the family afterwards sued the sentatives of the purchaser to recover possessio ground that a miras pottah covering a portion property in suit was made by a widow of one three original owners, who were brothers, and th not, under Hindoo Law, extend beyond her own li but the latter claimed to hold, both in respect widow's lease and in respect of the share of the three brothers, which their predecessor in t purchased, HELD, *firstly*, that, as the wido whom the lease had been taken was not the w the brother whose share defendants held, their sion for a long series of years under the wido be taken as an adverse possession, any disturb which was now barred by limitation; and, that, in respect of the portion which was not tected, the plaintiffs could only recover posse it by repaying the amount of the money laid the purchase by the defendant's predecessor in

Jackson, J.—ON the two points have been argued in this case, it appe us that the special appellants have reas their side. The plaintiff sued to r possession of an 8-anna share of c properties specified, making his title heir of Huro Prosad and Lukhee Pros brothers. When the suit came on for t turned out that, besides Huro Prosad Lukhee Prosad, there was a third b named Kali Kishore. The defendants under a lease from Chitro Rekha, wh the widow of Lukhee Prosad, and the p iff's contention was that there was no ground under the Hindoo Law for the m of this miras pottah, and that, conseque was not good beyond the lifetime of C Rekha. The defendants thereupon said however that might be, they were hol the share, not only of Chitro Rekha, but of Kali Kishore, and as Kali Kishore many years ago, and Chitro Rekha wa his heir under the Hindoo Law, the posse held by her during all this time be considered as an adverse posse and the reversioner is barred. U that the Judge observes: "If a C

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"has to decide on the evidence before it "in this case, whether Lukhee Prosad pre-"deceased Kali Kishore or not, I think it "must be said that it will be very difficult "to come to a satisfactory or a definite "conclusion. Now, both the brothers died "during a cholera epidemic in 1233 B.S., "that is, nearly fifty years before the witnesses "were examined. There are only three "witnesses who depose to this fact—Joy "Chunder Sen, Raj Mohun Roy, and Kirtee "Chunder Surmah. One witness says that "Lukhee Prosad died a month before; "another says twenty days before. Now, how "can such evidence be accepted to prove "the fact of Lukhee Prosad's dying before "Kali Kishore 50 years ago, and that in "an epidemic which must have been very "severe for it to be impressed in the minds "of the witnesses so vividly." All that has to be said to this observation is that these witnesses were those of the plaintiff, and not called by the defendants to prove those facts. The Judge's reason for declining to accept their evidence is a very curious one, but not satisfactory to our minds. He says: "Two of the witnesses "who depose to this fact were mere lads of "13 or 14, an age at which, as a psychologi-"cal fact, the memory is not so retentive "as that of a child, or of one again "whose mind has arrived at full maturity." The evidence, whatever it is, is all on one side, being that of the plaintiff's own witnesses who make statements against his case, and it must also be borne in mind that Lukhee Prosad was the elder brother, and there was nothing improbable in the fact of his having died first. There is also no reason why these witnesses should have made such a statement unless they did recollect the fact. That being so, the Judge had no ground whatever for setting aside the judgment of the Subordinate Judge upon that point, and we do not understand him to have any strong opinion himself, because he does not come to the opposite conclusion. On this point, therefore, we think that the decision of the Judge must be set aside, and as regards the share of Kali Kishore, the plaintiff must be declared to be out of time.

Then there is the other question whether, as to the shares of Huro Prosad and Lukhee Prosad in regard to which the plaintiffs sued, the defendants are not entitled, before surrendering the property, to receive back the price which they paid. Upon that point we are very much surprised to find the Judge observing that no case whatever had been made out for a refund. The Judge does not appear to be acquainted with the authorities on this point. Such a decision on this point was considered to be called for by the common principles of equity. Having purchased the property of a joint family without notice that there were contested rights, and in the belief that the vendor was entitled to sell or grant a mowrosee lease, the defendants are, we think, entitled, when a third party comes forward and claims the property, to be reimbursed the price which they have paid, unless any bad conduct or bad faith is brought home to them. There seems to have been some attempt to show bad faith on the part of the purchaser, and the observation of the Judge on this point appears to us little short of extraordinary. The Judge says: "It must be remembered "that appellant's father, Raj Chunder Roy, "was a well-known pleader of this district. "He knew perfectly well what he was about. "Why, I ask, should he have taken these "pottahs benamee through his servant and "relative, Prannath Chowdhry? I admit that "benamee leases are constantly executed, but "there is in every *bonâ fide* benamee lease a "reason for so doing. What reason was "there for this benamee lease?" Then as to the consideration, he says: "The *sthith* "of shoslukolas property is entered at

"Rs. 215-5-15. The total expenses, including "sudder jumma, saranjamee, &c., are Rs. "125-0-5-15 krants, leaving a clear profit of "Rs. 90. Out of this profit, appellants get "Rs. 60. In other words, appellant's father "got this miras ijara pottah at eight years' "purchase, for he paid Rs. 480 as considera-"tion for the same." Now, if a person is to be presumed guilty of bad faith because he is a well-known pleader, all that we can say is, that it is a very unfortunate circumstance for gentlemen who become well known in that respectable profession. Likewise, if bad faith on a man's part is to be presumed, because he has taken a pottah benamee in the name of a relation, that is also a bad thing for the native community in general. In no possible point of view are these two matters, taken separate or together, sufficient for the purpose of establishing a presumption of bad faith. As to the price paid, that is simply a question which was determined with reference to the local circumstances and the capacity of the property to fetch at the time it was let out to the defendants' father. It appears to us that, upon the ordinary principles, and in the absence of any circumstance whatever which prevents the operation of those principles, the defendants are entitled to receive back the purchase-money in respect of these shares. The other share they are entitled to keep in possession on the ground of limitation. The decree of the Lower Appellate Court will be accordingly reversed. The decree of the Court of first instance is restored with this modification that the defendants are declared entitled to receive back the purchase-money. Each party will pay his own costs throughout.

The 19th May 1876.

Present:

The Hon'ble A. G. Macpherson and G Morris, *Judges.*

Chakran Lands—Cessation of Service—B Occupancy Right—Relation of Landlo Tenant—Arrears of Rent.

Case No. 673 of 1875.

Special Appeal from a decision pas the Officiating Subordinate Jud Tipperah, dated the 23rd Dec 1874, reversing a decision of the tional Moonsiff of Commillah, date 13th December 1873.

Suroop Sirdar and another (Defendan *Appellants,*

versus

Moharajah Beer Chunder Manikby Bahadoor (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *A Chunder Sen* for Appellants.

Baboos Kalee Mohun Doss and *Door Mohun Doss* for Respondent.

An attempt having formerly been made o cessation of the services rendered by some p bearers to oust them from certain chakran lands w they had held for many years, and which they claimed to hold rent-free for the future; and it ha been held on that occasion that, though theirs wa a rent-free tenure or an uninterrupted tenure fro time of the Decennial Settlement, yet they had el acquired a right of occupancy, HELD now, on a being brought by the zemindar against the same be for recovery of rent, that, although the former had not been brought by the zemindar personally, by the persons to whom he had attempted to tra the lands, yet the decision in that suit clearly e

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s between the zemindar and the palki-bearers, n of landlord and tenant, which now empower- to recover arrears of rent from them.

cpherson, J.—THIS suit for the re- of rent alleged to be due is, in , also a suit for the determination of te of rent payable by the defendants plaintiff.

e plaintiff is the Moharajah of Hill rah, and the defendants are palki- rs by profession, who, in consideration ecified services required of them by oharajah as porters and carriers, have o held and enjoyed certain lands h have been assigned to them) free t. Some little time ago, the Moha- dispensed with their services, and gave lands in jotedaree tenure to Kalee n Singh and others. These persons ht a suit for rent against certain ryots, actual cultivators of these lands; but, the intervention of the palki-bearers present defendants) the suit was dis- d. They then instituted a suit in the Court against these same parties to es- h their right to, and to recover possession ese lands. The palki-bearer defendants ed it on the ground that the lands ituted their *chakran* rent-free tenure by them from a time anterior to the nnial Settlement. Both the lower Courts d that the lands were not rent-free ser- lands; but the Lower Appellate Court ed to give a decree for possession to plaintiffs, holding that the palki-bearer dants had been long in possession of nds, and were ryots having a right of pancy within the meaning of section 6 e Rent Law. The plaintiffs appealed e High Court, contending that they ht to have been put in possession of the s in suit, because the only plea set up the defendants, *viz.*, that they held the s as a rent-free service-tenure, had been d against them, and that they ought not to have been allowed in appeal to take up the new ground of being ryots with a right of occupancy. The High Court, however, on two occasions (first on the special appeal, and then on an application for review of judgment), overruled this objection, and affirmed the order of the Lower Appellate Court.

They found that the contract between the Moharajah and the palki-bearers was that the latter should hold these lands on the condition of performing certain personal services in lieu of payment of cash as rent, and they further found that the palki-bearers had held and enjoyed the lands so long on these terms that they had thereby acquired a right of occupancy within the meaning of section 6, and could not be ejected. This being the final result, and the position and rights of the parties having been thus defined, the Moharajah served a notice on the defendants in Pous 1281 (Tipperah era), calling on them to pay him rent at certain specified rates in 1282. On their failure to pay by the 1st Bysack 1283, the Moharajah brought the present suit to recover the rent due, as specified in the notice, for the year 1282. The first Court dismissed the suit on the ground that plaintiff could not sue to recover rent of these lands until he had first established, in a suit brought for the purpose, his right to receive it. On appeal, the Lower Appellate Court held that the relationship of landlord and tenant had been already established by the previous proceedings; and, after considering and determining what were the rates of rent to which plaintiff was fairly entitled, gave the plaintiff a decree accordingly.

In special appeal it is contended that—

1st.—The previous suit was not a suit between the Moharajah and the palki-bearer defendants, and consequently the latter are not bound by any decision in it, determining rights as between them and the Moharajah.

2nd.—That, even taking the previous suit as one between the present parties, the decision in it is no bar to defendants' setting up the plea of non-liability and of having it determined whether the Moharajah can claim rent from them as ryots, jotedars.

We think, however, that the former suit must be deemed to have been, in substance, a suit brought on behalf of the Moharajah, though brought in the name of his ijaradar. What was discussed in all stages of that suit, and what was decided by the High Court, were the relative positions of these palki-bearers (defendants) and the Moharajah. The appellants, in their written statement, para. 6, themselves treat the ijaradar's suit as being in fact the suit of the Moharajah, and seek to use it as against him. We think that that suit must be held to have settled conclusively the matters in dispute between the Moharajah and these palki-bearers, so far as these matters were in fact finally decided in that suit.

If the decision in that suit is conclusive now, it seems to us that the appellants (the palki-bearers) are out of Court, and that their appeal must be dismissed, for we have no doubt that, in the former suit, it was decided by the High Court that the palki-bearers' plea of holding rent-free service-lands was not valid, and that they had only a right of occupancy, and were liable to pay rent to the Moharajah. That having been so decided, and the Moharajah having formally dispensed with their services as palki-bearers, and having given them notice of the rent which he sought to assess on the land, the palki-bearers are, in our opinion, bound now to pay rent. The Lower Appellate Court has assessed the rent at a certain rate, and his finding as to that has not been objected to before us.

On the whole we think the appeal should be dismissed with costs.

The 29th May 1876.

Present:

The Hon'ble A. G. Macpherson and G Morris, *Judges.*

Proceedings in Execution—Substantial Pos sion—Benamee Purchase—Fresh Suit for session.

Case No. 138 of 1875.

Regular Appeal from a decision passed by Moonsiff of Russoolgunge in Sylhet, the 11th February 1873.

Kristo Gobind Kur and another (two of Defendants), *Appellants,*

versus

Gunga Pershad Surma (Plaintiff), *Respondent.*

Baboos Joy Gobind Shome and *Rajend Nath Bose* for Appellants.

Baboo Gopal Lall Mitter for Responden

Where the property of a judgment-debtor was sol execution of a decree against him, and purchased person who was afterwards held by the Civil Cou have purchased the property *benamee* for the judgm debtor; and the same estate was attached and sol second time in execution of another decree, and the purchaser went through the pretence of taking fo possession, but was not put in substantial possessio his purchase, and finally brought a fresh suit against *benamee* purchaser who, he complained, had been set up the ryots against him: HELD that a fresh suit wo not lie; that the auction-purchaser ought to have b put in substantial possession in the proceedings ha execution; and that, if he himself and the Court h done their respective duties, there would have been difficulty in putting him in substantial possession, si ing that the defendants could have been physically p out, if necessary.

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Macpherson, J.—On the 8th of January 1866, the right, title, and interest of Juggo Mohun Shyam in a 4-anna share of a certain estate was sold in execution of a decree of a Civil Court, and was purchased by the appellant, Kristo Gobind.

On the 15th of January 1866, the right, title, and interest of the same Juggo Mohun in another estate were also sold in execution of a decree of a Civil Court, and were purchased by the same Kristo Gobind.

Subsequently, the several properties so purchased by Kristo Gobind were attached under a decree in another suit against Juggo Mohun, a suit in which one Jhooti Parch was the plaintiff. The properties being so attached, Kristo Gobind came forward and claimed them under section 246, Civil Procedure Code, as being his own, and in no way belonging to Juggo Mohun or liable to attachment. On the 24th April 1868, the Subordinate Judge rejected Kristo Gobind's claim, holding that Kristo Gobind had purchased *benamee* for Juggo Mohun; and that the property was, in fact, in the possession of Juggo Mohun at the time of attachment in Jhooti Parch's suit.

On the 30th of May 1868 the property was sold, and Jhooti Parch himself was declared the purchaser. After that, on the 28th Assar 1275, Jhooti Parch sold what he had bought to the plaintiff in the present suit (who is the respondent now before us). On the 4th Assar 1278, the formal pretence of giving possession to the plaintiff by sticking up a bamboo on the land was gone through by the Court, but no actual possession was ever obtained by the plaintiff, who, instead of properly working out the decree on which his title depended, instituted this present suit, filing his plaint on the 7th June 1872. This suit is against Kristo Gobind, his brother Radha Nath, and the representative of Juggo Mohun who is now dead. The plaint, after stating the facts more or less obscurely, says that Kristo Gobind and Radha Nath, in collusion with Juggo Mohun and his representative, prevented the ryots from giving the plaintiff kubooleuts, and have retained possession of the disputed property in their own hands, and that, therefore, he sues for possession.

It seems to us that the present suit will not lie, for the plaintiff, who occupies the position of the purchaser to whom the property was sold in execution of Jhooti Parch's decree, ought to have got the possession which he now sues for by proceedings had in execution of Jhooti Parch's decree.

He may have experienced difficulty in getting possession under the decree in Jhooti Parch's suit; but, so long as he did not get possession, he could not properly bring a fresh suit in order to have himself put in possession. If the course he has taken were the right course, litigation would be endless. For, if we were now to give him a decree for possession, and he, under our decree, rested content with the mere formal possession, which consists of planting a bamboo on the land, the plaintiff would be no nearer obtaining substantial or real possession then than he is now; and another fresh suit would be just as necessary then as when this present suit was commenced.

It is clear that the Court which was executing Jhooti Parch's decree, having, on the 24th of April 1868, found that the purchase by Kristo Gobind was a purchase *benamee* for Juggo Mohun, and that Juggo Mohun was in actual possession of the property, that Court, in executing the decree, should have given the purchaser substantial possession under section 263 or section 264. There ought not to have been, and need not have been, any difficulty about it, if the plaintiff had availed himself of the provisions of the law, and the Court had done its duty.

Radha Nath is said not to have been a

party to the proceedings under section 246; and it is argued that, for that reason, the present suit was necessary. But Radha Nath's own case, as stated in his written statement, is, that he and Kristo Gobind jointly bought the property in Kristo Gobind's name. And, if Radha Nath bought jointly with Kristo Gobind, Radha Nath is bound as much as Kristo Gobind by the proceeding under section 246. The Court having found that Juggo Mohun was the owner, and in possession of the property, ought to have put the purchaser in real possession, and we cannot understand why the Court did not do so if the purchaser wished to take possession.

The present suit must be dismissed on the ground that the purchaser at the sale held in Jhooti Parch's suit, not having been put in possession, it is only, by proceeding in the ordinary way in that suit, that the plaintiff can get possession now. The mere form of sticking up a bamboo on land, if nothing more is done or attempted, is not putting a party in possession. It is a mere pretence and no reality, and is not possession within the meaning of the Civil Procedure Code. The Court should have given him substantial possession under section 263 or under section 264, either by physically turning out the defendant if he was in actual possession, or by making the tenants understand distinctly that the property had passed to the purchaser, and that future rents must be paid to him. No possession has been given either under section 263 or under section 264; and the present suit will not lie. If the plaintiff is entitled to possession, he can only obtain it in Jhooti Parch's suit.

The plaintiff's suit is dismissed with all costs.

The 2nd June 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, C *Justice*, and the Hon'ble W. A *Judge.*

Indigo Cultivation—Joint Possession and agement — Consent of Co-sharers — profits.

Case No. 2514 of 1874.

Special Appeal from a decision pass the Judge of Sarun, dated the June 1874, reversing a decision Subordinate Judge of that Di dated the 19th May 1873.

Baboo Debee Pershad Sahoo (Plaintiff *Appellant*,

versus

Baboo Gujadhur Pershad Narain Sing (Defendant), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Mr. M. L. Sandel for Respondent.

Where a five-anna shareholder in an estate s to be put in joint possession of it with the repre tative of the owners of the remaining eleven a and the latter contended that he had, for many ye held the entire land in suit and cultivated indigo o and that plaintiff's right in the said land was con to the receipt of rent for it, HELD that plaintiff entitled to joint possession and management of land; that defendant could not cultivate indigo o without the consent of the plaintiff; and that consent said to have been given to the defendant the other co-sharers could not bind plaintiff:

HELD, also, that plaintiff was entitled to mesne-prof with interest.

Garth, C.J.—WE think that the Judge has made a mistake here, and that he has

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misunderstood what was the real nature of the suit and the defence which has been set up to it.

The plaintiff is the owner of a five-anna share in the 32 beeghas of land in dispute, and the defendant No. 1, under certain leases which had been made to him by the other co-sharers, represents the remaining 11 annas share.

The plaintiff alleges that the defendant has been cultivating indigo on these 32 beeghas of land, and that such cultivation has caused injury to him, and that since he came of age the defendant has continued growing indigo without his consent and despite his wishes.

The defendant does not pretend to say that he has not been in possession of these 32 beeghas, or that he has not been cultivating indigo thereon. What he says is, that he has for a great many years been in possession of the whole of this property; and he contends that, because he has been in possession all these years, he has a right to cultivate indigo or any other crop he pleases, and that the plaintiff has no right to dispossess him, but only a right to receive the rent proportionate to his share. In the written statement he says: "The defendant having been in possession of the disputed land for about 9 years, without opposition or hindrance from any one, the plaintiff has no right now to dispossess him, but to receive rents," and in the next paragraph he says: "In the event of dispossession, the defendant will have to incur a heavy loss of some thousands of rupees." This, it may be observed here, is inconsistent with what he says now that he has no power over these lands which are in the possession of ryots, and that all that he gets is his rent from them. If so, it is difficult to see in what way he will have to incur a loss of thousands of rupees. Then he goes on: "The plaintiff has no other right, but the receipt of rents for the land in claim."

That being his answer to the suit, it was not necessary to go into any evidence, because he admits the dispossession of the plaintiff, and he says that having been in possession for nine years he has a right to keep the plaintiff out of possession, and to prevent his having any share in the management of the property; and all that the plaintiff has to do is to receive the rents in proportion to his share.

In this contention, we consider that the defendant is wrong. We think that the plaintiff is entitled to the joint possession and joint management of this property with the defendant, and that the defendant has no right to be cultivating indigo or anything else upon it in despite of the plaintiff and against his wishes.

Then it is stated that, in those leases by which the plaintiff's co-sharers leased their shares to the defendant, and under which the defendant claims to be entitled to the possession and management of these 32 beeghas of land, there is a stipulation authorizing the defendant to grow indigo thereon. We think that such a stipulation ought to have no effect as against the plaintiff.

We accordingly declare that the plaintiff is entitled to joint possession of, and control over, the lands contained within the boundaries given in the plaint, being 32 beeghas more or less, with the defendants; and that the first defendant is not entitled to cultivate indigo thereon without the plaintiff's consent; and further that the provisions of the leases granted by defendants Nos. 2 to 8 to defendant No. 1, so far as the same may authorize him to grow indigo within the village of Sareputtee, are inoperative as against the plaintiff; and we further declare that the plaintiff is entitled to the mesne-profits of the lands above mentioned (to be assessed

when this decree is put into execution) from the 15th of January 1872 to date of this decree, with interest thereon at 6 per cent. per annum from the date of ascertainment to the date of realization.

The plaintiff will have his costs in all the Courts.

The 9th June 1876.

Present:

The Hon'ble W. Ainslie and E. G. Birch, *Judges.*

Suit for Possession—Partition—Arbitration-award —Compromise— Registration— Stamp Duty.

Case No. 2728 of 1875.

Special Appeal from a decision passed by the Judge of Sarun, dated the 27th July 1874, affirming a decision of the Subordinate Judge of that District, dated the 6th May 1873.

Nem Roy (one of the Defendants), *Appellant,*

versus

Lalmun Roy (Plaintiff) and others (Defendants), *Respondents.*

Baboo Judoo Nath Sahoy for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Where the subject-matter of various suits between co-sharers in an estate was referred to arbitration, and this brought out other members of the family, who appeared before the arbitrators, and on whose appearance the whole question of the distribution of the family-property was submitted to the arbitrators by a fresh agreement, which was followed by a compromise; and the arbitrators made an award which, however, was not signed by all the parties, and which was subsequently dealt with by the High Court as being no award at all except as against those who signed it —the said Court, however, suggesting that a fresh suit might lie on the basis of the compromise wh been submitted to the arbitrators by all the p HELD (in a suit for possession subsequently br the basis of that compromise, in which plaintiff a decree in the lower Court, but defendant a to the High Court) that the decision of the Court was good in law, and that the appeal m dismissed with costs:

HELD, also, that the solehnama filed in the c in effect a deed of partition, and, as such, did not registration, nor does it require a stamp.

An agreement to have a deed of partition dr in a particular form can be put in unstam evidence of the intention of the parties.

Ainslie, J.—THE plaintiff sues for p sion of four annas of Mouzah Sheikhpo mesne-profits, on the ground that he the defendants were co-partners in th lage and in other properties, and th consequence of disputes among them, was a reference to arbitration follow a compromise and award in accordance with, by which the specific property claimed was allotted to the plaintiff as hi of the family-estates; he states th defendant has wrongfully taken advant an order of Court, dated 19th July 18 refuse compliance with the award, b such order in no way warrants his con

The defence is simply that the sup award was bad for several reasons, and been modified by the Court, and in cancelled.

In 1871 suits were brought by s members of the family against Nem and others, which were, by consent parties and order of Court, referred to tration. Thereupon other members of family who had not joined in the appeared before the arbitrators, and the w question of the distribution of the fa property was submitted to them by a f agreement to refer to arbitration. This followed by a compromise, dated 26th J 1871, submitted to the arbitrators, who the made an order. This, however, was signe three, and left unsigned by two, of them.

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this award being returned into Court, the Subordinate Judge held that he had nothing to do with that part of it which did not affect the subject of the pending suits, and accepted as an award on the reference by the Court only so much as did relate to that subject. This appears to have led Nem Roy to refuse compliance with that portion of the award which dealt with matters referred to the arbitrators by the second submission. Thereupon Bhurrut Roy brought the award into Court. His application to the Court is not before us, and, therefore, we do not know precisely all that it contained; but, from the judgment of this Court reported in 22 Weekly Reporter 129, it would seem the Judge treated it as an application under section 327 of the Civil Procedure Code, and made a decree in accordance with it. On appeal to this Court the award was held, for reasons which it is unnecessary for us to discuss, to be no award at all as regards persons other than the parties to the first suit; at the same time the learned Judges (Phear and Morris, JJ.) pointed out that it might be that a suit could be maintained on the basis of the compromise, though they declined to consider the case before them as a suit so framed.

In the present suit the plaint is framed as stated above. The Judge in the first Court distinctly understood that the claim rested on the solehnama as the basis of the arbitration-award. He says the suit is as per plaint based on a solehnama executed by the parties on arbitration-bond and decision (of arbitration) and the Court's decision dated 20th May 1872 (the last is not alluded to in the plaint). The Judge of the Lower Appellate Court also understood the suit to be so framed, and rests his judgment on the solehnama, alluding to the decisions of the Court merely as evidence in support of it. His words are: "In the present "suit plaintiff sues for possession by determi-"nation of title in regard to part of the "property not the subject-matter of the "three suits above mentioned, and *the Sub-"ordinate Judge has given him a decree "on the ground that the solehnama of "the 26th June 1871 was a valid docu-"ment executed by, and binding on, all "parties, and that it decided in his favour "the plaintiff's title to the property in suit;* "and that the plaintiff's title is also proved "by the above-mentioned decision of the "20th May 1872 and the 7th April 1873, "enforcing the award. It is now said that "the suit must be dismissed, because the "High Court has set aside these decisions "and award, and of course if the Subordinate "Judge's decision or the claim were based "on these documents alone, this would have "to be done; but plaintiff has sued for deter-"mination of title broadly, and he is entitled "to prove this in any way he can without "regard to these decisions, and, to do so, he "has filed the solehnama, and this document "clearly proves his title to the property "now in suit: *Defendant No. 1 has stated "that this document is collusive and "fraudulent, but there is no evidence brought "forward in support of this statement; "and as the document has now been in "Court for some years, it is rather late "to make such an objection to it. Defend-"ant's own witnesses, however, were pre-"sent at its execution, and their evidence "establishes it.* The defendant has ad-"mitted possession of the property in suit, "saying that he would give it up when the "arbitrators' awards were enforced. The "plaintiff, therefore, has proved his claim, "and I, therefore, dismiss the appeal with "costs."

In this judgment the Judge uses the words "plaintiff has sued for determination of title broadly," and appellant relies on this as showing that the decision is based on the title of plaintiff as a member of the family,

and not on the solehnama. Clearly this is a misreading of the judgment. What the Judge intends is, that, if the award and decisions be put aside, the title of the plaintiff as a member of the family, having a joint interest in all the family-property, which interest has been converted by the solehnama into a separate interest in one particular village, must prevail. If he did not intend this, there would have been no object in going on to find specially that the solehnama is a duly executed and binding instrument.

The objection taken that the genuineness of the solehnama was not put in issue is a mere quibble ; the first issue is badly framed, but the question on which evidence was adduced, and which was determined under that issue, simply whether the solehnama *was voluntarily and intentionally executed* by the defendant (these are the Subordinate Judge's words).

The appellant, however, has further objections to this solehnama that it is inadmissible in evidence, *1st*, from want of stamp ; *2nd*, from want of registration. On the first point it is enough to refer to two decisions of this Court—the first in 11 Weekly Reporter 520, the second in 25 Weekly Reporter 80. Numerous intermediate decisions might be cited ; but it is sufficient to show that the ruling of Sir Barnes Peacock has been followed up to the present time. Want of registration is possibly not to be treated in the same way ; on this point we express no opinion. The document relied on by plaintiff is in effect a deed of partition, and, as such, does not require registration. Although it is an instrument declaring an interest in immoveable property, and so would appear to come within clause 2, section 17, Act VIII, 1871 (and the corresponding clause of the Act of 1866), it is one of those specially mentioned in clause 7 of section 18. Under these circumstances, we are bound to read the law in favour of the instru We are not aware that the point has discussed in this Court. In 6 Madras Rulings, page 9, there is mention reference to the High Court, on whi Court held that registration of an i ment of partition is optional.

The solehnama, though unregistered also be supported on the ground tak the late learned Chief Justice in the above cited from 11 Weekly Reporte was not a deed of partition, it was o agreement to have a deed of partition up in a particular form, namely, in the of an arbitration-award ; if that dee never executed as held by this Court suit of Bhurrut Roy (21 Weekly R 129), the agreement can be put in ev to show the intention of the parties.

The appeal is dismissed with costs.

The 5th May 1876.

Present :

The Hon'ble Louis S. Jackson and W McDonell, *Judges.*

Sale under Reservation—Breach of Con Farming Lease—Right of Re-convey

Case No. 2347 of 1874.

Special Appeal from a decision by the Judge of Dacca, dat 5th May 1874, affirming a decis the Moonsiff of Manickgunge, dat 30th July 1873.

Ramnath Sen Lushkur and others (Pla *Appellants,*

versus

Mr. J. P. Wise and others (Defendan *Respondents.*

Baboo Rash Beharee Ghose for Appell

Mr. J. T. Woodrofe and *Baboo R Churn Miter* for Respondents.

Where a share in an estate had been sold stipulation that the purchaser should possess it

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rd, or, if desirous of parting with it, should to the original owner or his heirs at a fixed and the purchaser, having been restrained by ement from selling off this property to a third had, on his retirement to England, given other a farming lease of it for fifteen years, HELD the object of the original stipulation was to the constant possession of the share to some th whom the original owner or his heirs, who ined the residue of the estate, could keep up relations, the grant of the farmer's lease was ion of the covenant; and that the heirs of the owner were entitled to have the share in suit d to them at the stipulated price.

kson, J.—WE have not re-heard this and have had the advantage of hearing gument of Mr. Woodroffe on behalf client, Mr. Wise; but the conclusion ich we have arrived is the same as that we had previously come to. In one g respect we may correct here a mistake h we made in stating the facts when gave judgment before. We stated on occasion that, upon the sale by the w, Jugodissuree Dossee, to Mr. Wise, of -anna out of the entire 3-anna share by this family, the father of the present tiffs and the parties with whom the , which we shall presently mention, was luded, had brought a suit *after* the h of Jugodissuree. We now find, on ing to the ekrarnama, that they, with unusual promptitude, brought the suit inst Mr. Wise and against Jugodissuree elf. The sale to Mr. Wise was in o B. S., and the suit appears to have n commenced in the English year 1845, ich would correspond with the Bengali r 1251 or 1252. The whole decision of suit depends upon the construction which are to place on the ruffanama executed Mr. Wise on one part and Ram Nath Sen hkur and others on the other part. That cument recites that, out of the entire 5 annas gundas 2 cowries 2 krants share held by e different members, 3 annas 11 gundas cowrie 10 krants were held by the plaintiff's cousin, Raj Kishore Sen Lushkur, and, after his death, were sold by his widow to Mr. Wise; that, thereupon, the father of the plaintiffs, Shumboo Nath Lushkur, having commenced a suit and then having died, this arrangement was entered into between them and Mr. Wise, and the arrangement is in these words: Having said that some part of the property had been already sold, it says:* উক্ত ৵০ আনা হিস্যাতে খরিদগি হকিয়তে আমি স্বয়ং দখিলকার থাকিব, যদি আগমস্য ঐ বক্রী কিসমতহায়ের খরিদগি হিস্যা আমার বিক্রী করার আবশ্যক হয় তবে আপনার খরিদগি কয়ালার লিখিত উক্ত ৯০৯৲ টাকা কোম্পানি কিস্মতে তোমাদিগের কি ওয়ারিসানের নিকট ভিন্ন অন্য কাহারও স্থানে দান বিক্রি ইত্যাদি হস্তান্তর করিতে পারিব না, যদি করি তবে তাহা অগ্রাহ্য। That is to say: "I shall personally continue in possession. If, hereafter, I should have occasion to sell the purchased shares in the remaining kismuts, then I shall not be at liberty to make gift, sale, or other transfer of the said property otherwise than by sale to you or your heirs for the purchase-money Rs. 909 as specified in my bill of sale." Now, it seems that, long after the execution of this instrument in 1835, Mr. Wise has disposed of, at least, a great portion of his landed property in this country, and has left India and resided in England, whether with the intention of finally settling there or not does not appear. It is in evidence that Mr. Wise, at least his agents, had intended to sell this property along with others which were large indigo concerns, when, this ekrar having been discovered, the negotiations which were then on foot went off, and the concerns have since been sold to other persons for the same amount of money,

* Ukta dui áná hishyátè kharidgi hakiyaté ámi shayang dakhalkár thákiba; jadi ágamashya oi bakri kishmathayer kharidgi hishya bikri karár ábashyak hay, tabé ápanár kharidgi kabálár likhit a ukta nay shatta o nay taka kampáni kimmaté tomádigér ki wárishánér nikat bhinna annya káháro sthané dán bikri itiyádi hastantar karité páriba ná; jadi kari tabé táhá agrájhya.

with this difference that, instead of this particular property being sold, the purchasers got an ijara lease of it for fifteen years. It seems to have been contended on the part of the plaintiffs that this ijara was not what it purported to be, but was, in fact, another name for a sale out and out. This is denied on the part of Mr. Wise, and the Judge has found, and we fully accept his finding, that the ijara is, in fact, an ijara, and that Mr. Wise would be authorized and competent at the end of that term, supposing that he were living and disposed to do so, to re-enter into the personal possession which is contemplated in the ruffanama, and that the tenure of the ijaradar-defendants would thereupon cease and determine. The question, therefore, is whether Mr. Wise, by giving over this property upon a fifteen years' farming lease and then leaving the country, has not broken his covenant as contained in this ruffanama and entitled the plaintiffs to demand that the property should be conveyed to them. Now, it should be borne in mind what the terms of this document are, and also what the circumstances are which led to this covenant. In the first place, the Sens are not merely the reversioners who, but for the sale, would have succeeded to the 2-anna share conveyed to Mr. Wise, but they are themselves co-sharers and owners of another share. They had, therefore, not merely to take care of their interests in regard to the share sold, but also to look to their own comfort and convenience in enjoying the share that remained, and for that purpose it was essential to them that the person owning and possessing should be a person with whom they could maintain, so to say, comfortable relations. That being so, when we read the terms of the ruffanama, we think it impossible to resist the conclusion that what they meant to bargain for was that Mr. Wise should personally retain possession of the property, and should not in way alienate it or let it go into the hand others without giving them the refusal the option of taking it at the price he had paid for them. It is sugg that the words * স্বয়ং দখিলকার থাকি they are not to be taken merely in con tion of the promise not to alienate, ha separate signification, and that, in such a the remedy is to be sought in an actio damages. But that is not the sense in we think these words are to be consid They must be taken and read with the terms of the covenant as meaning that Wise must either himself remain in poss or re-convey to the Sen Lushkurs, and, as aforesaid, was not in any way to all the property either by gift, sale, or other It is then suggested that what Mr. has done is no breach of the covenan personal enjoyment. Clearly what parties had in contemplation was that Wise, like the Lushkurs themselves, sh retain in his own hand that possession is known as the owner's possession, th to say, should exercise rights as land let the lands to tenants, collect rent otherwise hold as zemindar. It was to us as a case which might occasion difficulty as to what would be do Mr. Wise, instead of granting this ijara gone to Calcutta or gone to England, le a general manager to look after his af Probably the answer is that, if Mr. had done so, the manager acting under general instructions and following out employer's policy, would, in some deg if not entirely, fulfil the obligations imp by the ruffanama. It may be that Court would, in such a case, be under so difficulty. But that is not the case bef us. Here Mr. Wise has made over property in lease for fifteen years, and

* Shayang dakhalkár thákiba.

left the country. It appears to us that that is a substantial violation of the contract entered into between the parties. As far as we can see, the plaintiff in the suit of 1845 would apparently have succeeded and obtained from the Court a decree setting aside the widow's sale. We say so, because of the remarkable diligence shown by the party interested who brought the suit within two years of the sale and while the widow was still living when there would be no difficulty on the defendant's part to prove circumstances in justification of the sale by the widow. In this state of things, when the reversioners were content to accept this settlement, we think we are bound to carry it out in strict accordance with its terms, and see that those terms are not in any way evaded. We say *evaded* without intending to impute any improper conduct to Mr. Wise or to others. We may point out that the judgment of the Lower Appellate Court is not so entirely favourable to the conduct of the parties as is contended for, because the Judge says: "There can be "no doubt from the evidence produced, and "indeed the defendants seem now scarcely "to deny that the fifteen years' lease was "given to protect themselves from the "consequences of the ekrar, but, at the "same time, there is nothing in their evi-"dence or in the circumstances to show "that the lease is not a *bond-fide* one with "a reserved rent to the lessor during the "time of the lease and right of re-entering "at its expiry. Again Mr. Wise's letter, "though it is a sort of admission of the "genuineness of the ekrar, is certainly not "at all what the plaintiff wants to make it "out, a direction to his agents in this coun-"try to give the plaintiff the lands on the "terms of the ekrar." That clearly means that, although they were forbidden to alienate by the express terms of the ekrar, still they did the nearest thing they could to it by giving this lease for a long term. On all these considerations, we think that the plaintiffs are entitled to the judgment of the Court, and that they should have this property conveyed to them at the price stipulated. Something has been said as to the Moonsiff having taken the same view in favour of the defendants as the Judge has done, and it is suggested that the Moonsiff, as being a native of this country, was well qualified to form an opinion as to the meaning of the covenant that the parties had entered into. But it appears to us that the Moonsiff did not take care to look closely into the document on which he decided, because that which he sets out as being the language of the document is not so in fact. The plaintiff will be entitled to his costs of this hearing and of the Courts below.

The 10th May 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Principle of Enhancement—Suit for Arrears at Enhanced Rates—Time for bringing Suit.

Case No. 1242 of 1875.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Nuddea, dated the 13th March 1875, reversing a decision of the First Moonsiff of Bongram, dated the 23rd February 1874.

Mr. George Glasscott, Manager of Mr. M. F. Sandes, and another (Plaintiff), *Appellant,*

versus

Raj Chunder Moochy Mundul and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Mr. L. M. Ghose and *Baboo Golap Chunder Sircar* for Respondents.

The intention of s. 29, Act VIII. (B. C.) of 1869, is that a suit for arrears at enhanced rates should not be

deferred beyond the third month after the year for which enhancement is claimed.

The provision for enhancing rent to the rate prevailing for the same class of lands is exceptional, applying to cases in which, from some exceptional causes, a ryot is holding at an unusually low rate, and is not intended—after the rent has been raised on some ryots in any place for a special reason—to furnish a means for raising the rents of all the ryots of the same place to the same rate.

Jackson, J.—As regards the first ground on which the Lower Appellate Court bases its judgment, we do not concur in the opinion there expressed. The intention, as it seems to us, of section 29 of Act VIII. (B. C.) of 1869 is, that the bringing of a suit for arrears of rent at enhanced rate, as to which there has been no adjudication, or, so to speak, confirmation by a competent Court, is not to be deferred beyond the third month at the end of the Bengalee year on account of which the enhancement is claimed. But then there are other grounds into which the Court below has very fully gone, and as to those grounds we are bound to say we generally concur in opinion with the Court below. It must be observed that the Courts, in dealing with these cases, must, in the first place, consider whether the plaintiff seeking to enhance the rent complies with the provisions of the law under which he comes. We very often observe in cases of the same kind as that which is now before us that evidence is produced of witnesses who depose, as the witnesses in the present case have deposed, that the rates claimed by the plaintiff are the rates of the village. The objection which the Subordinate Judge takes to the evidence in the present case is one in which we sympathize, *viz.*, that the testimony of the witnesses is vague. It is equally applicable to ten thousand other cases and to the particular case before us. The witnesses speaking of the land, the rent of which is sought to be enhanced, say that it, *viz.*, the whole of it, is the same kind of land as that which they themselves hold, whereas these witnesses do not hold more then ten or fi beeghas at the most. Is it probable such evidence is exactly true? They say that the rates claimed by plaintiff those paid by all the tenants of the vill This, it is clear from the Ameen's re is not true. The Ameen's report does show that the majority of the ryots pay the same rate, and this brings us to principle on which the plaintiff appe have gone, and which appears to us not e templated by the law when laying down first ground of enhancement, *viz.*, that tenants do not pay the rate preva amongst ryots of the same class for la of similar description and with similar vantages. That provision, we think, meant to apply to exceptional cases—c where a particular ryot from excepti causes is holding lands of a particular kind not at the rate at which lands of that kind are usually held. It was not, we think, tended that some of the ryots should enhanced on specified grounds, and then provisions of this clause should be appl for the purpose of enhancement as to remaining ryots. But in the present case think the judgment of the Lower Appell Court is right, in so far as it holds th neither the witnesses for the plaintiff n the judgment of the Moonsiff point to a tangible clear ground on which the pres defendants are liable to be enhanced. We not find the judgment of the Moonsiff dea ing closely with the evidence of the plaintiff witnesses. What he says is: "I have go through the papers on the record and hear the arguments on both sides." It would be far more satisfactory if the Moonsiff ha addressed himself to the evidence given in his presence instead of recording a judgment six weeks afterwards based upon a leisurely perusal of the record. The appeal is dismissed with costs.

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The 12th May 1876.

Present:

Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

or Possession—Verification of Claim—Collusive Decree.

Case No. 2100 of 1875.

Appeal from a decision passed by the ge of the 24-Pergunnahs, dated the 31st ust 1875, modifying a decision of the nsiff of Sealdah, dated the 29th March .

Doss Mullick (Defendant), *Appellant,*

versus

oma Churn Mozoomdar (Plaintiff), *Respondent.*

vans and *Baboos Ashootosh Dhur, Nil dhub Bose,* and *Jadub Chunder Seal* Appellant.

Mr. R. T. Allan for Respondent.

e, in the first instance, a plaintiff was allowed, Appellate Court, entirely to shift the ground n the first Court, and he not only abandoned the part of his claim, but also sought a distinct from that asked for in his plaint; and where, econd instance, the Appellate Court overlooked ding of the Moonsiff—that the plaintiff had d a collusive decree by omitting to make defendant a party to a previous suit for the same property for which he, the said defendant, had given valuable consideration—and declared plaintiff's title to possession instead of merely giving him the possession sought for, HELD that, on both the above grounds, the judgment of the Appellate Court must be reversed.

Jackson, J.—IN the judgment which is now before us in special appeal, the Judge has, looking at the nature of the case, we may say, somewhat shortly reversed a very elaborate and careful judgment of the Moonsiff; and upon that judgment there are a great many remarks which arise, but the principal of them and those which operate principally are these: In the first place, the appellant before the Judge, that is to say, the plaintiff, has been allowed entirely to shift the ground taken in the Court of first instance, and not only to abandon by far the greater part of his claim, but also to ask for a remedy entirely distinct from that which he asked for in his plaint. The Judge says: "On the case coming on for "hearing, it was announced that the claim "to the 10 beeghas sold by Chunder Kant "to Dino Nath Sen, and now in respond-"ent's possession, was abandoned. I have "therefore only to deal with the claim to "the 5 beeghas originally leased to Dino "Nath Sen by Chunder Kant, but now held "for 20 years by respondent under lease." The way in which he seems to have been asked to deal with, and he did deal with, the case is that, instead of giving plaintiff what was sought for, that is, actual possession of the property, he has declared the plaintiff entitled to possession under the decree of 1st December 1871 in the manner prescribed in section 224 of Act VIII. of 1869 of a half share in the property, 5 beeghas more or less, covered by a lease of 31st May 1860. That is the first point. The second point is, that the Judge has entirely given the go-by to all the observations of the Moonsiff in respect of

the *bona fides* of the suit in which the plaintiff's vendor had obtained a decree of which he now desires to reap the benefit. The Moonsiff found, and found, as appears to us, on exceedingly cogent reasons, that that was an entirely collusive suit, but the Judge is of opinion "that the respondent as lessee "is not entitled to question it now, or to "raise any objection to the assumption by "the appellant of the position to which he "succeeded by purchase of the mortgagee's "interest in the suit No. 1121 of 1871 "and the decree dated 1st December 1871." Now, the Moonsiff shows very clearly that, if the plaintiff were acting *bond fide*, he ought to have made the present defendant, whom he knew to have been long in possession of the property for valuable consideration, a party to that suit, but the Judge sanctions the conduct of the plaintiff in omitting to do so, and considers it proper to make the present defendant subject to the consequences of what took place, for he says that the respondent, as lessee, is not entitled to question now what took place in the former suit. Anything more hard it is impossible to conceive. It appears to us that on these grounds—others might also be mentioned—the judgment of the Lower Appellate Court is erroneous, and must be set aside, and the judgment of the Moonsiff dismissing the suit must be restored with costs.

It should be stated that Mr. Allan came into Court after the learned Counsel for the appellant had concluded his arguments but before the Court had given judgment, but he declined to take the time of the Court in attempting to support the judgment of the Court below, if this Court thought it proper to reverse that judgment.

The 19th May 1876.

Present:

The Hon'ble L. S. Jackson and W. [illegible] McDonell, *Judges.*

Twenty Years' Occupation—Eighteen Y[illegible] Occupation—Presumption.

Cases Nos. 2393 and 2394 of 1875.

Special Appeals from a decision passed by Officiating Judge of Nuddea, dated 26th May 1875, affirming a decision of Moonsiff of Ranaghat, dated the 29th [illegible]cember 1873.

Radha Moye Dey Chowdhry (Plaintiff), *Appellant,*

versus

Aghore Nath Biswas and others (Defendants), *Respondents.*

Baboos Mohinee Mohun Roy and *Kishor[illegible] Mohun Roy* for Appellant.

Baboo Rash Behary Ghose for Respondents.

In a suit relating to four jummas in the possession of the same persons, in which it was proved that three of the jummas had been held at the same rent for two years, but that the fourth, having only been purchased eighteen years previously by the said persons, had been longer in their own possession, HELD that a presumption might arise that the jumma itself had been held at an unchanged rent for twenty years, and that the lower Courts were justified in inferring that such had been the case.

Jackson, J.—THE point raised in special appeal is, that the Lower Appellate Court has not found upon the evidence, as it ought to have done explicitly in respect of all the four jummas held by the defendants, whether these jummas had been held at a rent unchanged for more than twenty years. Now it appears to us that the Judge has plainly enough expressed his opinion that that was so in respect of three out of the four jummas, upon the documents adduced, and that he also meant to find the same thing in regard

fourth jumma, although the series of ents in respect of that jumma extended o 18 years. We think that, although khillas in respect of that jumma went o 18 years, being the whole time that sed since the jumma was purchased e defendants, the Court was at liberty r that it had continued to be held at changed rate of rent for twenty years, e presumption, therefore, might arise. think we ought not to interfere in l appeal with the concurrent findings two Courts below. The appeals are, ore, dismissed with costs.

The 19th May 1876.

Present:

Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

ract Law—Sale Law—Proprietor's Liabili- for Revenue—Effect of Contract on Pro- tor's Liability — Co-sharers — Farming se—Rent Receiver and Revenue Payer— for Arrears of Revenue.

Case No. 2367 of 1875.

al Appeal from a decision passed by Officiating Judge of Nuddea, dated 29th June 1875, reversing a decision the Officiating Moonsiff of Ranaghat, ed the 29th November 1873.

Tarinee *alias* Sawah Monee Debia (Defendant), *Appellant,*

versus

enath Mookerjee (Plaintiff), *Respondent.*

oos Bhyrub Chunder Banerjee and *Bipro Doss Mookerjee* for Appellant.

aboo Kally Mohun Doss for Respondent.

Where two co-sharers in an undivided estate took from ird co-sharer a farming lease of her interest in a portion of the said estate, on the stipulation that they should meet the Government demand on the said co-sharer, and take credit for the amount in the rent reserved; and the two farmers leased out the same share in a dar-ijara lease to a fourth person, who, on the failure of the said farmers to meet the Government demand, paid it in himself to save the estate, and then brought a suit against the third co-sharer to recover the amount; and the Moonsiff decided that the suit could only lie against the two farmers, but the Judge ruled that the suit could only lie against the third co-sharer as proprietor:

FOUND by the High Court that, as the third co-sharer's share was not separate, and the whole estate was liable to sale for default, the two farmers were generally liable as proprietors with the third co-sharer, and, having recovered the rent for the share, might have been made liable for the revenue, even if the suit had been brought, as supposed by the Judge, under s. 9, Act XI. of 1859; but

HELD that, as the suit had not been brought under any particular section of the law, s. 69 of the Contract Law applied to the suit as well as s. 9, Act XI. of 1859, and that the money paid by the dar-ijaradar was recoverable from the two farmers who had realized the rent and were responsible, both under their contract and as co-proprietors, for the revenue.

Jackson, J.—THE plaintiff in this case held a dar-ijara of a share in a certain joint zemindaree, and held it under Anund Pershad and Sharoda Pershad Mookerjee, who were ijaradars of that share and who were also co-owners thereof, but who held the particular share in ijara from Tarinee, the defendant. Between Tarinee and her co-sharer ijaradars there was a stipulation that they were to pay on her account the Government revenue due upon her share, taking credit for the same in the rent reserved. It appears that in 1868-69 the co-sharer ijaradars omitted to make such payment, and the plaintiff dar-ijaradar paid it in and brought this suit to recover the amount, not from his immediate superiors, the ijaradars, but from Tarinee. Tarinee objected that she was not liable, and the Moonsiff dismissed the suit. On appeal the District Judge reversed that judgment in the following words. Speaking of the second point raised before him, *viz.*, that,

supposing the plaintiff to have had any interest in the estate to protect, this suit ought to have been brought against the ijaradars, and not against the defendant, he says: "Section 9 of Act XI. of 1859 "states that such a suit as the present will "lie only against the defaulting proprietor. "It is not, therefore, within the discretion of "the Court to consider any arrangement "which the defendant and the ijaradars may "have made between themselves." Now, it does not appear that the share of Tarinee had been separated, or that payment of rent was made separately on account of that share. Consequently, all the co-sharers were in default, and the whole estate may have been sold. It was, therefore, in the power of the dar-ijaradar to have made this payment under section 9, in order to protect the estate, and to bring a suit against the co-sharers, and in that case the Court, we think, might make the provision that the amount so paid might be recovered against these two co-sharers who, in the capacity of ijaradars, had received the money. But the suit was not brought under section 9 of Act XI. of 1859. It was not brought under any specific provision of law whatever. The plaintiff simply stated the facts and alleged himself to be entitled to the decree asked for. The Court, therefore, had to take into consideration section 69 of the Contract Act as well as section 9. Under section 69 the plaintiff was clearly entitled to recover from the ijaradars. It appears to us, therefore, that, in this view of the case, the ijaradars who had received the money out of the revenue to be paid, and who were amongst the defaulters, ought to have been sued, and not the defendant Tarinee. The decision of the Judge, therefore, reversing that of the Moonsiff, is wrong, and must be set aside with costs.

The 10th June 1876.

Present:

The Hon'ble W. Markby and G. G. Ma[illegible]
Judges.

Hindu Marriage Law—Restitution of Con[illegible] Rights—Neglect of usual Ceremonials—Husband's Right.

Case No. 1282 of 1874.

Special Appeal from a decision passed [illegible] the Deputy Commissioner and Subo[illegible]nate Judge of Gwalparah, dated [illegible] 23rd March 1874, reversing a deci[illegible] of the Extra Assistant Commissi[illegible] and Moonsiff of that District, dated [illegible] 30th December 1873.

Boolchand Koilta (Plaintiff), *Appellant*

versus

Janokee and others (Defendants), *Respondents.*

Baboo Girija Sunker Mojoomdar for Appellant.

Moonshee Serajal Islam for Respondents.

Where a man—who had been married to a wo[illegible] but had failed to go through the second cere[illegible] without which, according to the customs of his ca[illegible] the woman would have been defiled had he obtai[illegible] possession of her, and had actually married a sec[illegible] wife, and left the first woman to believe that she was [illegible] liberty to contract another marriage, which, indeed, s[illegible] has done—now sued for restitution of conjug[illegible] rights, HELD that, though, after a first marriage, [illegible] man's right to the person of his wife was complete [illegible] yet, where, as in the present case, there were othe[illegible] ceremonies which were usual, but had been neglected, and the claimant had not shown cause for his neglect, he was not entitled to a decree.

Markby, J.—THE Deputy Commissioner appears to have taken an incorrect view of

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this case, as well as of the Hindu Law and of the decisions of this Court.

According to the decisions of this Court the general Hindu Law is that, as soon as a ceremony of marriage has taken place, the right of the husband to require his wife to live in the same house with him is complete (23 Weekly Reporter, page 178).

There may be, however, a custom binding upon a particular class or caste that the wife, if a child, should remain in the house of her parents and guardians until she is fit for cohabitation. Such a custom has been, and, we have no doubt, always would be, recognized by the Courts (23 Weekly Reporter, page 22).

It might also be possible that by custom, before any conjugal rights could be asserted, a second ceremony of marriage was necessary, though the general Hindu Law requires no such ceremony.

The Deputy Commissioner, when the case was first before him, thought that, in the class to which the parties to this case belong, a second ceremony was necessary before the husband could assert any conjugal rights at all. There was no evidence on the record to support this view, and we accordingly directed a further inquiry. From the evidence now taken, it is clear that the opinion of the Deputy Commissioner on this point is incorrect.

What the evidence of the witnesses who have been examined under our direction proves is this: that, in the community to which these parties belong, when a ceremony of marriage has taken place, the husband has a right to demand that his wife should reside in his house, however young she may be, unless he has agreed with the parents that the child shall remain with them. But, before cohabitation as man and wife, a second ceremony must be performed. This second ceremony is called by some of the witnesses *Santeebia,* and by others *Panchbia,* and they say that, if a girl cohabits with her husband without it, she is defiled, and both she and her husband are outcasted.

The law applicable to the case is, therefore, clear; but we are a good deal embarrassed in dealing with this case by the loose way in which the facts are found by the Courts below. It seems, however, that the girl was 19 when this suit to enforce his conjugal rights was brought by the husband, and, therefore, the time for the performance of the second marriage had been long past. Nevertheless, the husband had taken no steps towards getting it performed, and, having married another woman, had left the charge of this girl, whom he now claims as his wife, entirely upon her parents. The girl, since attaining the age of puberty, has married another man, and there is evidence that, in this community, the girl may lawfully do so if the man who has gone through the first ceremony declines to perform the second ceremony.

Under these circumstances we consider that the husband has not given such evidence as will entitle him to a decree. He should have explained fully how it was that he deferred so long the performance of the second ceremony. Upon the evidence in the case it appears that the plaintiff neglected to perform the second ceremony at the usual time, and for a very long period afterwards took no steps to obtain a performance of this ceremony, but allowed the girl to act upon the presumption, fairly arising out of his own conduct, that he had voluntarily severed the tie of his first marriage. We are of opinion that he is not entitled to a decree, and we, therefore, dismiss the appeal with costs.

The 13th June 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Equity of Redemption—Rateable Allotment on Mortgage Properties—Government Assessment.

Case No. 121 of 1875.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 9th February 1875.

Maharajah Kishen Pertab Sahee Bahadoor (Plaintiff), *Appellant,*

versus

Lalla Nund Coomar Singh Parray and others (Defendants), *Respondents.*

The Advocate-General, Mr. R. T. Allan, Baboos Unnoda Pershad Banerjee and *Juggadanund Mookerjee* for Appellant.

Messrs. J. T. Woodroffe and *R. E. Twidale* and *Baboo Taruck Nath Sen* for Respondents.

Property, which is the subject of a mortgage, may be sold in satisfaction, but it must be sold as a whole, and not piecemeal at the pleasure of the mortgagee. The proper course is to make an inquiry into the relative values of the properties included in the mortgage, and to burden each with a proportionate share of the debt. It must not be assumed that the Government assessment represents the true value of estates.

Glover, J.—THE plaintiff in this (which we may remark has already the subject of two remands by the Court) is the mortgagee by pu from the original holders of two k of Mehal Mahole numbered in the T Nos. 609 and 612 and of Jelalpore No. He also purchased the equity of redem in Nos. 609 and 612 and afterwards portion of No. 610, becoming as re these properties both mortgagor and gagee. He now sues to recover the am due on his mortgage by the sale of Jelalpore, No. 610.

In consequence of what fell from learned Counsel engaged in this case not think it necessary to go at any le into details. It is sufficient if we say the plaintiff cannot equitably have a which is a burthen upon the whole of mortgaged property satisfied by the of a portion of that property and so that part in which he holds an equity redemption from all share of the burt Property, the subject of a mortgage, be sold in satisfaction, but it must be as a whole, and cannot be disposed of pie meal at the pleasure of the mortgagee. this case the plaintiff would throw the w of the mortgage-debt on one of the pled mouzahs in which also he had the eq of redemption over a part only. Ph and Putherpore, which are in the defenda possession, are not subject to the plaint equity of redemption. It is said, and allegation has not been denied, that property called Mahole, Nos. 609 and 612, worth much more than the amount of plaintiff's mortgage-demand. This may but whether so or not, Mahole must p its share towards liquidating the mortgage debt. (Nathoo Shahoo *vs.* Lalla Ameer Chand, 24 Weekly Reporter 24.)

The decision of the Subordinate Judge cannot perhaps be supported in the way it

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been given, but substantially it enun- the proper and equitable course to be ed.

e order we shall make in this case is, an inquiry shall be made into the relative of the properties included in the mort- and that each of them shall be propor- ely burthened with its share of the debt. it is decided what sum is due upon wo mouzahs held by the defendants, can be called upon to pay this sum, we understand that their Counsel agrees heir behalf to pay it. In calculating value of the properties, the Subordinate e must be careful not to assume that Government assessment represents the value (*vide* judgment of Privy Council Nowab Azmut Ali Khan *vs.* Jowahir h, 14 Weekly Reporter 17). Many mstances might make that assessment y unsafe guide as to what the real value e lands was.

here remains the question of costs. Advocate-General for the appellant not dispute the fairness of the order have made regarding the adjustment of mortgage-debt, but objects to pay the ondents' costs on the ground that they in frivolous objections in the Court w which necessitated two remands by Court. This is, no doubt, true, and ation with its accompanying expense prolonged by the defendants' action; the plaintiff's claim was an improper and, under all the circumstances, we k that, up to the date of the second and-order (10th September 1874), each ty should pay their own costs. The ts subsequently incurred should, we think, borne by the plaintiff, appellant, as he has, all practical ends, lost his case on appeal.

The 15th June 1876.

Present:

The Hon'ble W. Ainslie and E. G. Birch, *Judges.*

Remand.

Case No. 1742 of 1875.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 31st May 1875, reversing a decision of the Sudder Moonsiff of that District, dated the 29th November 1873.

Bama Churn Dutt and others (Defendants), *Appellants,*

versus

Puddo Mookhee Goopta (Plaintiff), *Respondent.*

Baboo Gopal Chunder Sircar for Appellants.

No one for Respondent.

Where all the evidence is before a Court, and it does not require further evidence to be taken by a lower Court on any point, while it retains the whole case on its own file, it should not remand the case to the lower Court, but decide the case on the pleadings brought forward on the issues.

Ainslie, J.—We think that the order of the Judge remanding this case to the first Court was wrong, because it appears that all the evidence that had been tendered was already on the record, and it was therefore the duty of the Judge to decide all questions arising between the parties on the pleadings and on the evidence which they had brought forward: subject of course to his power to direct further evidence to be taken either under section 354 or section 355 of the Procedure Code, retaining the case on his own file. We therefore send the case back to the Judge to be disposed of by him.

At the same time we think it necessary to point out to the Judge that his view on the question of limitation is not correct.

He probably overlooked the fact that this suit is governed by the new Law of Limitation, which took effect from the 1st of April 1873. The suit having been instituted on the 29th of August of that year, the period of limitation which applies to this suit is that prescribed by article 127 of Schedule II.

The Judge will re-consider the case with reference to these remarks.

The costs will be costs in the cause.

The 19th June 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble Romesh Chunder Mitter, *Judge*.

Accretion — Submersion—Special Appeal—Reserved Rights.

Case No. 2567 of 1875.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 16th July 1874, affirming a decision of the Subordinate Judge of that District, dated the 14th February 1874.

Mussumut Idan and others (Plaintiffs), *Appellants*,

versus

Nund Kishore (one of the Defendants), *Respondent*.

Mr. Ameer Ali and *Moonshee Mahomed Yusuf* for Appellants.

Baboo Rajendra Nath Bose for Respondent.

Where some lands lying between an estate and a river were sold, and no rights were reserved by the owners of the estate in some other land which had formerly existed on the river side, but had become submerged, HELD that all fresh accretions to the land on the river side would belong to the purchasers of that land, and not to the original owners, but that a finding on this point was one of fact on which no special appeal would lie.

Garth, C.J.—WE think that this appeal ought to be dismissed upon the ground that the question between the parties is one of fact. It has been found b Subordinate Judge, in the first instance afterwards by the Lower Appellate that the property which is the subj dispute belongs, not to the plaintiff, the Government. The Subordinate bases his finding upon the ground th land in dispute is an accretion to the G and appertains to the Government The Judge puts it upon the ground although the plaintiffs may, at some ti other, have been entitled to some 60 b of land in the bed of the Ganges, that was, at the time of the Government purc submerged by water, and that, in the by which the Government purchase mention or reservation was made b plaintiff of this land. The consequen that the presumption which would att such a case, there being no reserv applies here. The plaintiffs sell to Government all the land which lies bet that portion of their estate which retain and the river, that river being fact, the Ganges. Whether it was p the Ganges, and partly the Soane, does matter; it was still the river. Then river appears to have receded some years and in 1871 a suit was brought reference to the piece of land laying bet the portion which the Government originally bought and that now in disp and it was decided that the land which the subject of dispute in that suit belon to the Government as an accretion. T Ganges has now gone still further ba presumably the same principle would app unless, as we said before, the plaintiffs ha on the occasion of the sale by *them* Government, reserved any rights which the may have had in the lands which were the submerged. It does not appear that they made any such reservation. The Judge, therefore, found that they had abandoned

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er rights they may have had at that

now said that, because a stream ing which no information is given as having been fordable or not) flowed n the accretion, which, in 1871, had ound to belong to Government, and cretion which is now in dispute, the ow in dispute cannot be said to belong ernment. But, if the plaintiffs aban- their right to anything in the bed of ream at the time of the sale to ment, the accretion, whether it is in rm of an island, or is a continuous on to the old area which the Govern- bought, belongs to them. It was not d by the plaintiffs, and, therefore, the ption is that it belongs to Government. think, therefore, that the Judge is ly right in the opinion which he at, and that this special appeal must nissed with costs.

The 19th June 1876.

Present:

The Hon'ble F. A. B. Glover and W. Ainslie, *Judges.*

ancement of Rent—Average Produce.

l Appeals from a decision passed the Judge of Zillah Nuddea, dated 18th of March 1875, reversing the ee of the Sudder Moonsiff of that rict, dated the 31st of December 3.

Case No. 1167 of 1875.

heut Mundul (Defendant), *Appellant,*

versus

Shoorender Nath Roy (Plaintiff), *Respondent.*

Case No. 1168 of 1875.

Edu Sheikh Mundul (Defendant), *Appellant,*

versus

Shoorender Nath Roy (Plaintiff), *Respondent.*

Case No. 1169 of 1875.

Rutun Sheikh (Defendant), *Appellant,*

versus

Shoorender Nath Roy (Plaintiff), *Respondent.*

Case No. 1170 of 1875.

Koylash Ghose (Defendant), *Appellant,*

versus

Shoorender Nath Roy (Plaintiff), *Respondent.*

Baboos Mohiny Mohun Roy and *Issur Chunder Chuckerbutty* for Appellants.

Baboo Rash Behary Ghose for Respondent.

In applying the rule of proportion laid down in the Full Bench decision in the case of Thakooranee Dossee (3 W. R., Act X. Rul., 29), the Judge must consider the amount the ryots actually paid, and not what they ought to have paid.

The ryot is not entitled to any deduction on account of cost of production.

It is necessary to take the average values of the produce of a series of years, including the years of abnormal plenty and scarcity.

No. 1167.

THE first objection taken in this special appeal is, that whereas the rent paid by the zemindar and through him by the putnidar (the plaintiff in this case) had been decreased by the order of Government 25 per cent., the ryots never got the benefit of that decrease, but continued to pay, from 1257, 8½ annas per beegha for Mathan lands, Rs. 2 for Bastoo lands, and one rupee for Oodbastoo; and that the Judge has not taken into consideration this deduction, but has calculated the rent now to be paid upon the amount which

has been hitherto paid for the Mathan, lands. This objection appears to be of very little weight, because the question which the Judge had to consider was not what amount of rent the ryots ought to have paid, but what amount they did pay; and there is no doubt that willingly or unwillingly they did pay the rent which was originally assessed by the Collector, and made no attempt to have an abatement. The Judge, therefore, was justified in taking that rent as one of the elements in the proportion which he made in determining what the rent at the present time ought to be.

Then as to the objection taken that the Judge has based his calculation upon the price of rice, whereas the evidence, if there is any evidence, refers to unhusked rice or paddy, this objection is likewise untenable, for it is not denied that the prices of rice and paddy would bear the same relative value, the one to the other.

Then as to the objection that the Judge has not taken the net produce of the land into calculation, but only the gross value. It is said that the ryot, in having the calculation made, is entitled to have taken into account the costs of the produce, which are proved to be greater than in previous years, and that he is thereby entitled to a rateable deduction. As a matter of fact the Judge has allowed the extra costs, because he takes the costs of the produce in the same ratio as the price of the produce, and he finds that there is no evidence to show that the cost of production has risen in a greater ratio.

But, even if he had not done so, I do not think the appellant was entitled to any deduction on this account, as by the decision of the Full Bench in the case of Thakooranee Dassee, it was laid down by the majority of the Judges that the costs of produce ought not to be taken into calculation.

Then comes the question, which all is the only real question at issue this case, as to the way in which proportion has been calculated. The principle upon which the Judge proceeds this: He says there is evidence that 1257 or 1850 the selling rate of produce was so much, and that in 1872, which is the year in which the evidence in case was taken, the price is more double the amount it was in 1850, and therefore, the ryot ought to pay double what he then paid. Now there does seem to be any particular evidence upon which this finding could be come to, by assuming that the entry in the accounts books would be ordinarily sufficient support the Judge's finding that in 1872 the price was double of what it was 1850, that we think is not enough, that it would be unsafe to have a proportion of the relative values of the produce different years upon the result of one year taken first and last.

To do justice to both landlord and tenant it was necessary to take the average value of the produce of a series of years say five, from 1850 to 1855, always supposing that no one of these five years was an year of abnormal plenty or scarcity and then take the average value of the produce of these years; and then in like manner to take the average value of the produce of five other years at the end of the series, the one preceding 1872, and then calculate the proportion upon the result of the values thus obtained. Before holding plaintiff entitled to an increase of no less than 100 per cent. as has been given him in this case, it must be clearly shown that the value of the produce in 1872, when the suit was brought, is double that it was in 1850, taking the average of years. Of this no evidence has been taken in this case. We think, therefore, that the

rder to make would be to send the case the Judge in order that he may idence on these points and give ision accordingly, and the case will in order that the Judge may take e and pass a decision with reference above remarks. The costs of this will follow the result.

admitted that this judgment will the other three appeals, Nos. 1168, nd 1170 of 1875, which will like- remanded to the Judge for further as directed in this case.

The 21st June 1876.

Present:

n'ble Sir Richard Garth, *Kt.*, *Chief ice*, and the Hon'ble Romesh Chunder r, *Judge.*

udicata—Findings not forming part of a Decision—Limitation.

Case No. 1772 of 1875.

Appeal from a decision passed by udge of Tirhoot, dated the 8th May , affirming a decision of the Moon- of Mozufferpore, dated the 30th 1873.

ni Roy and others (Defendants), *Appellants,*

versus

sst. Rajbunsee Kooer and others (Plaintiffs), *Respondents.*

Chunder Madhub Ghose and *Judoo Nath Sahoy* for Appellants.

oos Kalee Prosunno Dutt and *Nil Madhub Bose* for Respondents.

, in a suit for some land, a Judge had consi- ecessary to find out the boundary between two nd had given a decision in favour of one of the who, in a second suit of the same kind, but ence to some other land, brought in the former o show that the land in dispute in the second be his if the finding as to the village boundary rmer suit was correct, HELD that the finding as to the village boundary in the former suit was conclusive only as to the land in dispute in the former case, but did not make the former decision conclusive as to the boundary line itself.

The merging of an issue of limitation in an issue as to possession is not an error in law.

Garth, C.J.—Two points have been argued in this case. One is, that in a former suit, which was decided between the same parties, 5 beeghas of land in the same neighbourhood were the subject of dispute. The present defendants then claimed those 5 beeghas; and it seems that for the purpose of determining that question, the Judge thought it expedient to ascertain for himself what was the boundary line between the two villages. Accordingly he inquired into the matter, and found what he considered was the boundary line, and judging by that line he decided that the 5 beeghas of land then in dispute belonged to the present defendants.

Now these 5 beeghas have nothing to do with the land in dispute in the present case. But it is said that the land which is now in question lies further towards the defendant's village than those 5 beeghas; and, therefore, as the Judge in that case found that those 5 beeghas belonged to the defendants, the lands now in dispute must also be considered as belonging to them. In fact, it was broadly contended, that the decision with regard to those 5 beeghas was conclusive as to the lands in question in this suit.

We are of opinion that this contention cannot prevail. The decision in that suit was only conclusive with regard to the particular land then in dispute; and, although the Judge may for his own purposes and as one of the means of arriving at a decision in that suit, have thought proper to ascertain the boundary line between the two villages, that does not make his decision conclusive as regards the boundary line, or as regards any other land than the 5 beeghas in dispute.

The other point is upon the question of limitation. The plea of limitation was raised in the Moonsiff's Court; and the Moonsiff, considering that this question depended upon the same evidence as the general question of title, tried the two questions together. Evidence appears to have been adduced on both sides for the purpose of proving which party had been in possession of this land; and considering what the nature and character of the land was, it is possible that the Moonsiff might have considered the oral evidence on either side entitled to little weight. At any rate he considered, and we think properly, that for the purpose of trying the question of title, as well as that of limitation, it was very proper for him to find to whose village or territory the land belonged. He accordingly set about deciding that question in a very careful way. He appears to have taken great pains, and to have spent several days on the spot, examining the survey-maps, and to have taken every other means in his power of arriving at a correct decision; and eventually in a well-considered judgment, he expressed his opinion that the plaintiffs were the real owners of this land; and there can be no doubt that in saying this he meant also to decide, and did decide, that the plaintiffs had been in possession of it until they were dispossessed by the Magistrate's order.

The Moonsiff, therefore, dealt with the two questions in one inquiry, and disposed of them by one decision; and in the grounds of appeal to the Lower Appellate Court, no complaint appears to have been made by the defendant of the manner in which he so dealt with the case. No objection appears to have been taken that the Moonsiff had not tried the question of limitation by itself, or that he had not tried it in a proper way.

The Lower Appellate Court then treated the case precisely as the Moonsiff had done. The Judge says that in substance there but one question to be tried between parties, and that was the question of ownership.

He seems to have considered, as Moonsiff did, that in this particular the question of ownership and of possession was one and the same, and should be with together; and upon considering whole case he has come to the same conclusion as the Moonsiff. We do not see error of law apparent on the face judgment, and we dismiss the appeal costs.

The 22nd June 1876.

Present:

The Hon'ble F. B. Kemp and E. G. *Judges.*

Ex-parte Decree—Service of Summons—Revival of Suit.

Case No. 10 of 1876.

Miscellaneous Appeal from an order by the Judge of Tirhoot, dated the July 1875, affirming an order of Moonsiff of Tajpore, dated the February 1875.

Shiboo Roy and others (Defendants), *Appellants,*

versus

Kashee Roy (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Mr. R. E. Twidale for Respondent.

Where an *ex-parte* decree had been given against three brothers, and it was shown that there had been only one summons, and that the serving-officer had merely posted the summons on the door of one of the without attempting to serve it personally on him HELD that the notice had not been properly served even on the one brother, still less on the two others; and that the defendants were entitled to have the suit restored on their application.

Kemp, J.—THE defendant is the special appellant in this case. He applied under

the provisions of section 119 of Act VIII. of 1859 to the Moonsiff to have the case which was decided *ex parte* against him restored to the file.

The Moonsiff held that there had been a summons served upon the house of one of the three defendants who are brothers, and there was evidence to show that Koonj Roy and Shiboo Roy, two of the three brothers, had knowledge of the fact when the case was coming on for hearing, and they instructed a pleader to file a confession of judgment. The Moonsiff, therefore, holding that they had knowledge of the institution of the suit, rejected their application to have it restored to the file on the ground that summons were not served upon them.

The Judge in a few words has confirmed the judgment of the Moonsiff. But we are of opinion that, under the provisions of section 119, if it should be proved to the satisfaction of the Court that summons were not duly served, it was the duty of the Court to pass an order setting aside the judgment, and appointing a day for proceeding with the suit. In this case it was admitted that the provisions of section 48 have not been complied with, and it is clear that there were *three* defendants. Therefore, under the provisions of that section, service ought to have been made on each of the defendants. There is no attempt to prove service of summons beyond the fixing of it to the house of Koonj Roy, one of the defendants; and there was one summons instead of three. We were in some doubt as to whether we should not consider as respects Koonj Roy that there had been due service of the summons. But, on referring to the *izahar* of the serving-officer, we are of opinion that he went to the mofussil accompanied by the plaintiff; that the plaintiff pointed out the house of the defendant; and that the Peadah, without any attempt to find the defendant, affixed a copy of the summons to the house of Koonj Roy. We do not think that this was a proper service; and therefore reverse the decision of both the lower Courts, and direct that, under section 119 of the Code of Civil Procedure, the first Court will grant a new trial, and appoint a day for proceeding with this suit.

The appeal is decreed with costs. Vakeel's fee, two gold mohurs.

The 22nd June 1876.

Present:

The Hon'ble W. Ainslie, *Judge.*

Sale of Tenure under Rent Law—Encumbrances—Decree based on Compromise.

Case No. 2752 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of Backergunge, dated the 31st August 1875, modifying a decision of the Additional Moonsiff of Perispore, dated the 28th December 1874.

Grish Chunder Ghose and another (Plaintiffs), *Appellants,*

versus

Mussamut Kalee Tara, mother and guardian of Nund Coomar Nag, minor (Defendant), *Respondent.*

Baboo Bungshee Dhur Sen for Appellants.

Baboo Grija Sunkur Mojoomdar for Respondent.

Where an under-tenure was sold in execution of a decree which had been passed in the terms of a compromise effected between the landlord and all the sharers in the tenure but one, and the representative of the latter sought to assert his right to his share against the auction-purchaser, HELD that, in a sale under Act VIII. of 1869, a tenure is sold outright, and that this tenure did not pass to the auction-purchaser with any encumbrances.

THE plaintiff in this suit is the auction-purchaser of a certain holding which was

sold under a decree. The zemindar brought a suit against the persons interested in that holding for arrears of rent, and a compromise was effected, and a decree made in terms of that compromise. One of the defendants in that suit was Nund Coomar, a minor, who is now suing by his guardian. He was not a party to the compromise, and the decree was not made against him, but against all the other co-sharers. The purchaser at the sale being unable to obtain possession of the property has brought this suit for the purpose of having the former holders removed from possession. The principal defendants did not appear to make any defence, but Kalee Tara, the mother of the minor, came in as an intervenor, and was allowed to take part in the proceedings as a defendant. She claims 1 anna 6 gundas 2 cowries 2 krants share of the holding on account of her minor son. The question is, whether the entire holding passed by the sale in execution of the rent-decree. The first Court was of opinion that it did pass, but the Subordinate Judge has come to an opposite conclusion, and modified the decree obtained by the plaintiff accordingly. The plaintiff is the special appellant in this Court. It is admitted that the decree for arrears of rent was for rent accruing on the holding which the plaintiff claims; but it has been contended that by the sale-certificate only the rights and interests of the persons therein named passed to the purchaser, and that it was distinctly the intention of the Court not to sell the whole tenure under the provisions of the Rent Law. The real question raised by the intervenor is whether a sale of the tenure could be rightly held under a decree made as this decree was made. This question, as it seems to me, affects the landlord decree-holder, so that he becomes a necessary party to the suit; and as the introduction of this intervenor as a party on the record involves the introduction of yet another party and materially changes the form of the s think the Court of first instance would acted wisely if it had refused to exerci powers conferred by section 73, and l plaintiff to such remedy as he could in the suit as originally framed by him. defendant, appellant, would have ha remedy under section 230 of the Civil cedure Code, and then the landlord have been properly added as a party an against her, she being the plaintiff i suit so instituted.

However, taking matters as they stand looking to the sale-certificate, I find th sets out in the heading that the sale held under the provisions of sections 59 60 of Act VIII. of 1869 (B.C.), and indep ently of that I cannot see how this sale be a sale of anything but the tenure. terms of section 59 are: "Whenev "decree may be passed for an arrear of "due in respect of an under-tenure w "by the title-deeds or the custom of "country is transferable by sale, and "judgment-creditor shall make applic "for the attachment and sale of such un "tenure, the Court shall, so soon as "under-tenure shall have been ordered t "sold," proceed as therein directed.

The property which was attached, and the sale of which this application was m was the very tenure in respect of which arrear had been declared to be due, and only in respect of properties other than tenure on which the arrear accrues that are held under the provisions of the C Procedure Code. The tenure itself on wh the arrear accrues is sold under Act VIII 1869, with the consequences that arise fr the provisions of section 66 of that A Although this minor was not a party to th solehnama, and was not made personal liable by the decree, the fact remains that a arrear of rent was declared by the decree o the Court to be due on account of a parti

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cular tenure, and that particular tenure was sold; and it seems to me that under such circumstances the auction-purchaser acquired that tenure free from encumbrances under section 66, and did not take merely an interest subject to encumbrances created by the judgment-debtor as he would have done under a sale held under the provisions of Act VIII. of 1859.

The Rent Law prescribes no special procedure for sales of under-tenures, and consequently such sales must, by virtue of section 34, be conducted under the provisions of section 249 of the Civil Procedure Code; but it does not follow that a notification of sale of rights and interests under this last section is to nullify the provisions of sections 59, 60, and 66 of the Rent Law.

If the decree was made collusively, if there was any fraud in the matter which would entitle the minor to re-open the transaction, he, of course, had his remedy in a proper suit against the decree-holder and the purchaser jointly; but it does not appear that there was any fraud of any kind. It does not appear that there is any doubt whatever as to the existence of an arrear at the time when the decree was made, and it seems to me that I ought to be guided by the judgment of the Full Bench reported in page 94, 21 Weekly Reporter. That, no doubt, was a judgment under the provisions of Act X. of 1859, but the principle of it applies to sales held under the more recent Act. I think the entire tenure did pass to the auction-purchaser, and that the Subordinate Judge was wrong in modifying the decree of the first Court, and that this appeal must be allowed with costs, and the decree of the first Court restored.

The 22nd June 1876.

Present:

The Hon'ble W. Ainslie, *Judge.*

Conjectural Award—Defective Evidence.

Case No. 1922 of 1875.

Special Appeal from a decision passed by the Officiating Additional Judge of the 24-Pergunnahs, dated the 31st May 1875, modifying a decision of the Moonsiff of Diamond Harbour, dated the 26th August 1874.

Mohesh Chunder Shawuth and others (some of the Defendants), *Appellants,*

versus

Joy Krishto Sircar (Plaintiff), *Respondent.*

Baboo Motee Lall Mookerjee for Appellants.

Baboo Taruck Nath Sen for Respondent.

Where, upon defective evidence and on conjectural grounds, an Appellate Court disturbed the order of a Court of first instance, and divided some disputed land between the parties to the suit, rather by way of arbitration than by way of a decision on the merits, the High Court restored the order of the first Court which had dismissed the suit.

I THINK that the decision of the Lower Appellate Court in this case must be set aside, and that of the first Court restored. The first Court dismissed the plaintiff's suit. The Judge has divided the subject of the suit between the parties, but he has not done so after finding any distinct right on the part of the plaintiff to any specific portion of the land, but rather by way of arbitration. To show this it is only necessary to give the Judge's own words. He says: "*In the absence of "any reliable evidence, and with only con-"jectural results from the inquiry,* I think "I shall be doing the best for both parties "if (without any further expenses on

"Ameens) I divide the disputed land be-
"tween them, giving plaintiff a strip next
"to the pond, 6 feet in width (corresponding
"with the green portion so far as it goes),
"and giving defendants the rest. I think
"the evidence and the inquiry show
"plaintiff to be entitled to a portion, and
"that this will be a fair estimate of that
"portion." Now, if the Judge of the Appellate Court had affirmed the judgment of the first Court, this Court would have been very unwilling to interfere; but, when we find that the Judge of the Appellate Court has reversed the judgment of the first Court, and has deprived defendant of the benefit which he had obtained by that judgment, although he himself states that there is no reliable evidence, and that his proceedings are conjectural, I think there can be no hesitation in setting aside that judgment. The appeal must be accordingly decreed with costs.

The 23rd June 1876.

Present:

The Hon'ble W. Ainslie and E. G. Birch, *Judges.*

Nila Zamin—Onus of Proof—Lease.

Case No. 1873 of 1875.

Special Appeal from a decision passed by the Judge of Dacca, dated the 22nd April 1875, affirming a decision of the Subordinate Judge of Furreedpore, dated the 13th February 1874.

Mr. George Maxwell Reily (Plaintiff), *Appellant,*

versus

Bama Soonduree Dossee, mother and guardian of Tara Prosunno Bose, minor, and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Kashee Kant Sen* for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondents.

Where a landlord leased out some land to a t reserving to himself only such portion of it as under the definition of *nila zamin*, HELD that i for the landlord, in a suit for the possession of *nila zamin*, to bring evidence to prove what por the land leased out was *nila*; and that, in the ab of such evidence, the whole land must be tak having been leased out to the tenant.

Ainslie, J.—THE plaintiff in this took a lease of certain lands from defendants in Chur Lunka. Some short afterwards he gave a sub-lease of the to the defendants, reserving certain described as *nila zamin*. In that lease he gives to the defendants all ex lands and all lands accreting there future saving the aforementioned *zamin*, whatever that might mean. suit is brought to recover a conside quantity of the land now in the posse of the defendants under that sub-lease, o ground that it is fit for indigo cultiv and is land intended by the words *zamin* in the agreement between parties. When the case first went b the Lower Appellate Court, the Judge it down to the first Court to take evid and record a finding on the point wh the words *nila zamin* had the p cular meaning ascribed to them by respondents before him. Thereupon Subordinate Judge, after taking evid records his finding in the following wo "In October, when the waters of the "have receded to a large extent, c "*boonani*, or broadcast sowings of ind "on these chur lands without any c "vation commence; it is an uncontrove "fact that the staple grown on these "churs is of a larger quantity and supe "quality than that raised on the hig "lands with the laborious and expen "process of cultivation, hoeing, and weedi "So, looking to these facts, I cannot say t "the term *nila zamin* has lost its o "nal literal meaning in this district w

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"the defendants' witnesses assert that these "*kanchee churs*, or newly-formed churs, are "called *nila zamin* in this part of the "district. I think from the above facts "that its actual etymological signification "is fully realized in this district when the "term *nila zamin* is solely or alone "applied to new chur lands whereon other "crops would not grow, but indigo would "be produced in a maximum quantity with-"out the expensive and laborious process "of cultivation." In brief, his finding is that "*nila zamin*" is locally understood to mean new deposits of soil on churs in the river, which deposits are not fit for cultivation in the ordinary way, but which can be sown broadcast with indigo. After receiving this return the Judge proceeded to dispose of the appeal. The words that he uses are not those of the Moonsiff. He says: "I think, therefore, that it must "be held that by the term *nila zamin* "was meant lands of a distinct class which "could be used profitably for the cultiva-"tion of indigo and could be used profitably "for the cultivation of no other crop;" and his introduction of the word "profitably" has no doubt given some colour to one of the grounds of appeal taken here; but we are of opinion that the Judge did substantially affirm and intended directly to affirm the finding of the Moonsiff of which we have already given a summary. Now, that being so, it is quite clear that it was for the plaintiff to show that the lands which he sued for were *nila zamin* within the meaning of the contract between the parties. He failed to do so, and, therefore, his suit was properly dismissed.

It is contended that the interpretation of the kubooleut is a matter of law, and not a matter of fact. We cannot accept this in the present instance. The whole question turns upon the intention of the parties as defined by the use of a peculiar term, and it has been found as a fact that that peculiar term is currently used in the district to describe land of a certain class. Taking this to be the proper meaning of the term *nila zamin* in the kubooleut, no question of law as regards the construction arises, and it is not open to us to say that the Judge below was wrong in finding as a fact that the parties intended to use the term *nila zamin* in a peculiar sense. It is argued that the facts found by the Judge are not sufficient for the determination of the rights of the parties, and this argument is based on the use of the word "profitably," and it is said that the Judge should have gone on to inquire whether, as a matter of fact, the land in dispute could be more profitably used in the cultivation of indigo than in the cultivation of any other crop. We have already said that, in our opinion, the finding of the Appellate Court is, in fact, an affirmation of the conclusion arrived at by the first Court. Although the Judge has used the word "profitably," what he really means, as we understand the judgment, is, that the land is of a peculiar quality which is fit for the cultivation of indigo, but which is not at the time fit for the cultivation of any other crop. It is further urged that there ought to be further inquiry whether the lands in suit are not *kanchee churs*, such as the Moonsiff describes them to be, and such as the plaintiff would be entitled to take possession of under the term *nila zamin* used in the agreement with the defendants. There appears to be no evidence whatever on the record to show that the whole or any definite portions of the lands in suit are of this nature, although the point was distinctly raised in the 9th paragraph of the written statement of Gunga Dhur Koondo and Dinonath Koondo, and also in the fifth issue laid down at the trial in the first Court. It was quite open to the plaintiff to give

evidence on this point, but he has not done so. There is a further complaint that evidence on this point was excluded when the case was sent down under section 354 for a finding by the Moonsiff as to the meaning of the words *nila samin*. But this complaint is wholly unfounded. It would have been irregular for the Moonsiff to have taken evidence on any point not specifically referred to him. Then an objection has been taken, which can hardly be serious, that the Judge ought not to have laid down any issue or made any remand to the first Court under section 354. That section gives the Court power to call for a finding from the first Court on any question of fact which appears to the Court essential to the right determination of the case on the merits; and surely the question as to the meaning of the words *nila samin* in the agreement between the parties was a question of fact bearing most directly on the merits, and *the one question* on the determination of which the whole suit turned; and, therefore, it was not only proper, but absolutely necessary for the Judge to have this point determined. Lastly, Baboo Kallee Mohun Doss contended that the onus of proof was thrown on the wrong party; that, as the plaintiff is undoubtedly the superior landlord, it was for the defendants to show that the whole of the lands in their possession are covered by the lease. Looking to the terms of the lease it is quite clear that the onus was on the plaintiff, for the lease gives to the defendants the whole of the existing lands and those thereto accreting with the exception of such lands as might be *nila samin*. It is not for the defendants to prove the exception, but it is for the plaintiff who relies upon it to prove it; and, when no exception is proved, the whole of the existing lands must be taken to have been conveyed under the lease. We therefore think that in this case the plaintiff has altogether failed to prove th at the date of the institution of this s there was any land in the possession of defendants answering the description *nila samin* as used in the lease and interpreted by the Court, and that, therefo his suit was rightly dismissed.

Under section 348 the respondent taken an objection that the Judge of Court below ought to have held that tenure of Mr. Bell was not transferable Mr. Reily. The real question which Ba Doorga Mohun Dass wished to raise was between his client as landlord and the pla iff as tenant. But in the present case it h pens that the position of the parties is ex ly reversed. In this suit the respondent the tenant of the plaintiff. It appears us that for the purposes of this suit it mi be perfectly well held by the Judge that Bell was competent to transfer his rig against his tenant to the present plaintiff, a that the present plaintiff is competent maintain a suit of this nature. The questi now raised is whether the defendant *landlord* is bound to recognize a transfer the tenure now held by plaintiff by person to whom he, the defendant, gra it without his consent. That is a questi between him as landlord and the plai as tenant. The only question which co be decided in this suit was a questi between the plaintiff as landlord and th defendant as tenant. The cross-objectio therefore, does not really touch the ju ment of the Court below. The same objec tion has been taken by the other defendant and the same decision equally applies in their case. The appeal is dismissed wi costs.

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The 23rd June 1876.

Present:

e Hon'ble W. Ainslie and E. G. Birch, *Judges.*

emple Funds—Representative of different Idols.

Case No. 1885 of 1875.

cial Appeal from a decision passed by he Judge of Dacca, dated the 25th lay 1875, affirming a decision of the Sudder Moonsiff of that District, dated he 22nd August 1874.

onshee Mahomed Akbar *alias* Tenoo Moonshee and another (Defendants), *Appellants,*

versus

lee Churn Geeree Gossamee Mohunt (Plaintiff), *Respondent.*

Baboo Kumla Kant Sen for Appellants.

Baboo Bussunt Coomar Bose for Respondent.

ough one person may be the representative of two , money brought into Court as the property of one cannot be applied by the representative of that idol y the debts of the representative of the other idol.

Ainslie, J.—The plaintiff, as mohunt of Akhra at Rumna, sues to recover money en out of Court by the defendants under decree against him as sevait of different nples—one being that of Rajrajessuree, other that of Ishwur Mahadeb. The dge has traced out the steps by which money in deposit got into Court, and shown that it was brought into Court on ccount of the Akhra at Rumna, and he cordingly is of opinion that, although the ame person may be the representative of he one idol in the one case, and of the other dol in the other case, the money brought nto Court as the property of the one idol n a suit instituted by the representative f that idol cannot be applied to pay the debts of the representative of the other idol. This view of the case is perfectly correct. The special appeal is dismissed with costs.

The 26th June 1876.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

Sale in Execution—Inaccuracy in Sale-certificate—Extraneous Evidence of Sale.

Case No. 10 of 1876.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 28th September 1875, reversing a decision of the Sudder Moonsiff of that District, dated the 24th March 1875.

Mussamut Maleebun and others (Plaintiffs), *Appellants,*

versus

Mussamut Raseeda and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

Where the widow of a certain person, whose share in an estate had been sold in execution of a decree and purchased by the decree-holder, sought to guard the share from the effects of the sale by pleading, *firstly*, that the sale-certificate did not correctly describe the share in suit, and, *secondly*, that her husband's share had been conveyed away to her at a period long anterior to the sale; and the lower Court ruled that the sale-certificate was inoperative, partly because, in permitting it to be inaccurately framed, the decree-holder may have intended to deal fraudulently, and partly because extraneous evidence of the sale could not be received, HELD by the High Court that, though the establishment of fraud on the part of the decree-holder would prevent his recovering anything, the existence of fraud in his dealings had not been found as a fact in this case, and could not be assumed; and that, where a sale-certificate was accurate as to any part of the description of the subject of sale, and could be used to identify it, with the assistance of extraneous evidence, such evidence could be received to show what was intended to be dealt with.

It appears that, by a butwara some time previous to 1860, a 1 anna 2 gundas 2 cowries share of a mouzah called Bazitpore Garowal was separated and constituted into a separate number in the Towjee, No. 4838. In the year 1860 it was again subdivided, and 2 gundas 2 cowries share was separated from it, and the residue 1 anna remained as the Towjee number, No. 4838. The present suit relates to 1 pie share in this 1 anna puttee. It is alleged by the plaintiff that he purchased this property in execution of a decree against Korban Ali. The defendant, the widow or wife of Korban Ali, opposes the claim, *1st*, on the ground that the plaintiff has not acquired any title by his auction-purchase, because the description of the property sold given in the sale-certificate and other documents connected with the sale-proceedings does not answer in any particular to the description of the property in suit; and, *2ndly*, that whatever interest her husband had in Mouzah Bazitpore Garowal was transferred to her by a *bye-mokasa* in 1860, long before the sale in question.

The Moonsiff decided both these questions against the defendant, and decreed the plaintiff's suit. On appeal the District Judge has reversed that decree, confining his decision only to the first of these points.

The facts connected with the first ground of defence are briefly these: The plaintiff, who was also the holder of the decree in execution of which the property in dispute is alleged to have been sold, made an application to execute it by attachment and sale of a property of the following description, *viz.*, the rights of the debtor in Mouzah Bazitpore Garowal in the *Puttee Tuksimee* of 3 annas 7 gundas 2 cowries share. This being a property paying revenue to Government under the provisions of the Code of Civil Procedure, he had to put in a copy of the extract of the revenue-register, and he accordingly put in a copy of such extract, in which the Towjee number was put down as 4838 and Puttee 1 anna 2 gundas 2 cowries, and Government revenue 8 rupees 8 annas 3 pie were mentioned. The attachment-processes and the sale-notifications gave the same description as was given in the petition for execution referred to above. The property was sold and purchased by the plaintiff, decree-holder. In the sale-certificate, which was afterwards issued, the same description was adhered to. The question for determination is whether, under that description, the plaintiff has acquired any right in the property in suit, which is 1 pie in the 1-anna Puttee of Towjee No. 4838

It has been found by the Lower Appellate Court, and the fact is not disputed here, that in Mouzah Bazitpore Garowal there is no such Puttee as of 3 annas 2 gundas 2 cowries in existence. The Lower Appellate Court held that, at the time of the auction-sale, besides the share in dispute, the judgment-debtor, Korban Ali, had other shares in the mouzah in question. This last finding has been questioned in special appeal upon the ground that there is no evidence upon the record to support it, and the learned pleader for the respondent admitted that it was so. On the other hand, from the butwara terij of 1860, it appears that Talook No. 4838, which was constituted by 1 anna 2 gundas 2 cowries partitioned share of Mouzah Bazitpore Garowal, was further sub-divided into two *puttees*, *viz.* one of 1 anna and the other of 2 gundas 2 cowries, and the debtor Korban Ali had a share in the one anna puttee only.

From what has been stated above it is evident that that part of the description of the property sold, *viz.*, "in the *Puttee Tuksimee* of 3 annas 7 gundas 2 cowries," is false and applicable to no "existing facts,"

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se in the mouzah there was no such at all in existence.

e Lower Appellate Court, on the ground is error in the description of he property, has held that the sale-certificate is erative, and has not conveyed to the plaint- y share in Mouzah Bazitpore Garowal. reasons for the decision of the learned e are not very clear and explicit, but, as s I have been able to understand them, amount to this: that the misdescription e sale-certificate can only be rectified by ence to other sale-papers, and for that se no other extraneous evidence is ad- ble to show what was actually intend- be sold. The District Judge suggests in describing the property sold thus neously, there might have been a fraudu- intention on the part of the decree- er of gaining an undue advantage over r intending purchasers in the auction- But he only suggests this and does find it as a fact. His finding goes only is extent that there was some room for d. I am clearly of opinion that, if fraud, l or constructive, had been established e part of the plaintiff in the matter of misdescription, he would not have been tled to recover anything in this suit; upon the finding of the Judge no such d has been established, and there is no dence on the record to establish it. Put- , therefore, the question of fraud on one , the decision of the Lower Appellate rt appears to me to proceed upon the und adverted to above.

The question before me, therefore, is ether the District Judge is right in law holding that, with reference to this error description, the plaintiff is not entitled to ow what was intended to be sold in execu- n of decree by any other extraneous idence than the sale-advertisement and the d-papers as he calls them. I am of inion that this view is clearly erroneous in law and opposed to the provisions of section 95 of the Evidence Act. According to this section any evidence was admissible to show what was intended to be sold. The question before me has been fully discussed in Taylor on Evidence, pp. 1046 to 1053, fifth edition. The result of that discussion, so far as it bears upon the circumstances of this case, is this: *1st*, that, if the description be so inaccurate as to render the identity of the subject-matter sold wholly uncertain, the document would be void and inoperative; and, *2ndly*, "if the "description be partly correct and partly "incorrect, and the correct part be sufficient "of itself to enable the Court to identify "the subject intended, while the incorrect "part is *inapplicable to any subject*, parol "evidence will be admissible" to show what was intended to be dealt with, "and the instrument will be rendered operative by rejecting the erroneous statement."

"The incorrect part" in this case, as has been shown above, "is inapplicable to any subject;" therefore the question is, admitting all sorts of extraneous evidence on the record bearing upon this point, whether "the correct part" is "sufficient of itself to enable the Court to identify the subject intended." This is a question of fact, and it will be for the Lower Appellate Court to determine it. But I may observe here that, if it be borne in mind that in No. 4838 and in Mouzah Bazitpore Garowal at the time of the auction-sale, the debtor Korban Ali had no share other than the one in dispute, and if the copy of the extract from the Revenue Register filed with the application for execution of the decree be considered along with all other evidence on the record, the question does not present any difficulty of solution. However, it will be for the Lower Appellate Court to determine it.

The decree and the judgment of the Lower Appellate Court is reversed, and the

case remanded to that Court to be re-tried according to the directions contained in this judgment. Costs to abide the result.

The 14th August 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Tipperah Raj Case—Jurisdiction—Title to Raj—Foreign Power, petty or sovereign—Zemindaree in British Territory—Legitimacy—Kachua—Shantigrihita Marriage— Status of Ranee—Mohadebya and Debya—Kulachar—Res Adjudicata—Appointment of Jubaraj.

Case No. 137 of 1875.

Regular Appeal from a decision passed by the Judge of Tipperah, dated the 27th of February 1875.

Rajkumar Nobodip Chundro Deb Burmun (Plaintiff), *Appellant,*

versus

Rajah Bir Chundra Manikya Bahadoor for self and as father and guardian of Jubaraj Radhakissen Thakur, Dina Bandhu Thakur Nazir, Jagu Mohun Soobha, Parbaty Churn Thakur, Gour Chundra Thakur, and Anand Kishore Thakur who appeared, and Gourey Churn Thakur Dewan, Ram Manikya Burmun Peshkar, Kassy Chundra Dass, and Bissonath Gupta, who did not appear in this appeal (Defendants), *Respondents.*

Messrs. Montriou and *Branson* (Counsel) and *Mr. Allan*, and *Baboos Nalit Chundra Sen, Bharat Charan Datta, Grija Shankur Mozoomdar, Nil Madhub Bose, Jadub Chundra Seal*, and *Mohit Chunder Bose* for Appellant.

Messrs. Paul, Woodroffe, Evans, and *Piffard* (Counsel), and *Baboos Kally Mohun Dass, Doorga Mohun Dass, Bh Mohun Doss, Sree Nath Dass, Ma Mohun Roy, Kash Behary Ghose, Bosanta Kumar Bose* and *Moo Serajul Islam* for Respondents.

The succession to the Raj of Tipperah being of beyond the jurisdiction of British Civil Courts, it be out of their power, in a suit relating solely to title of the Rajah to a zemindaree in British ter to go into the question of the Rajah's title to the The Rajah being a foreign power, the Courts accept the title to the Raj of the person recogni Rajah by the British Government. But, wh zemindaree lying within British territory, and shown to be an appanage of the Raj, formed the su of a suit, HELD that, since the right to the Raj had a long course of litigation, been made by the pa themselves to depend, as it were, upon the right this zemindaree, the Civil Courts had jurisdiction deal with the title to the latter; and that the applicable to the suit would be the Hindoo Law m fied by the *kulachar* or local custom regulating suc sion and inheritance in the Tipperah Family.

The recognition of the Rajah by the British Gov ment is less a matter of right than one of discretion position being that of a petty Rajah of a hill distr rather than that of a sovereign power:

FOUND, in concurrence with the first Court, up consideration of the whole evidence and the con of the late Rajah, as well as that of the plaintiff the Ranees of the late Rajah, that, though the le macy of the plaintiff had been satisfactorily establish and it was shown that his mother had been marri the late Rajah in the *shantigrihita* form, yet it clear that defendant had been created Jubaraj by late Rajah; and the plaintiff's claim must accordin be dismissed with costs.

[REMARKS.—On the point of jurisdicti and the rights of sovereign powers, th following cases were referred to on the si of the appellant during the argument:—

1 Knapp, p. 329.

Advocate-General vs. *Omur Chand.*

Secretary of State vs. *Nawab of Car natic*, p. 531.

29 Beaven, Coorg Raja.

6 Beaven, pp. 1-61. House of Lords, Duke of Brunswick's case.

1 Young and Collier's Exch. and Eq. p. 644, p. 653.]

Macpherson, J.—Although the hearing of this appeal has occupied eleven days, I do not think that in the view which I take of the matter I need say very much. The District Judge, Mr. Fowle, has in his judgment gone into the whole case at great length. He has accurately described the position of the parties up to the time when they appeared before him, and has shown in detail the various points contested, and the nature of the evidence relied on by either side. Concurring with the District Judge in nearly all the conclusions of fact at which he has arrived, I shall do little more than touch on certain prominent parts of the case.

The first question is as to the jurisdiction of our Courts to entertain this suit at all. Of course, if the Rajah of Independent Tipperah for the time being is (by virtue solely of his being Rajah) necessarily the person entitled to the zemindari which forms the subject of this suit, the Civil Courts of British India cannot go into the matter of title, beyond inquiring who is the Rajah recognized by the British Government, for the succession to the Tipperah Raj is in itself wholly beyond the jurisdiction of our Civil Courts. The Rajah being, as such, a foreign power, the Courts would be bound to accept the title to the raj of the person recognized as Rajah by the British Government. But I am not satisfied that this zemindari right fully belongs to the person, whosoever he may be, who is for the time being Rajah of Tipperah. The zemindari is spoken of as an appanage of the raj; but it is not proved to be so. If it is not, the Civil Courts cannot hold that this property, which consists of lands forming part of the British territories, belongs lawfully to any one who is not entitled to it according to the ordinary rules of law applicable, which would be the Hindoo Law modified by the kuláchár or special custom prevailing in the families of the Rajahs of Tipperah and governing the question of succession and inheritance.

Furthermore it appears to me that not only is the zemindari not shown to be an appanage to the raj, without reference to the rights of him who for the time being is *de-facto* Rajah, but in reality the right to the raj follows and depends upon the right to the zemindari. During the last seventy years there has been constant litigation in our Courts as to the rights to succeed to the zemindari, and whoever has been decided by the Civil Courts to have a good title to the zemindari has been recognized by Government as the Rajah, and has been in fact the Rajah of the independent territory. In the case of Ramganga Deo *vs.* Durgamoni Jubaraj (1 Sel. Rep., p. 270, or p. 361 in the new edition) the plaint was filed on the 12th of August 1805.. Durgamoni, claiming as Jubaraj appointed by the lately deceased Rajah, sued to recover from Ramganga the raj and zemindari of Chokla Roshnabad, Ramganga being in possession, and claiming as the son and heir of the deceased Rajah. Durgamoni was successful in establishing his title as Jubaraj appointed by the former Rajah, the father of Ramganga, and the result of the suit was that he not only recovered the zemindari, but became Rajah of Independent Tipperah also. Durgamoni having died the same year, Ramganga (who had been nominated Bara Thakur by his father) again in 1813 claimed the zemindari, and on this occasion successfully, becoming Rajah also. The order made (and eventually confirmed by the Sudder Court) as appears from the report of the case was, "that a precept be "issued to the Collector to make over the "raj and zemindari to Ramganga." (See Urjun Manik Thakur, &c., *vs.* Ramganga Deo, 2 Sel. Rep., p. 142, or page 177, new edition. Rani Sumitra *vs.* Ramganga Manika, decided finally on appeal in July 1820, 3 Sel. Rep., p. 40, or p. 54, new

edition.) Then we have the previous suits in which the title of the respondent Bir Chandra the present Rajah was assailed. (See Chakradhaj Thakur *vs.* Bir Chandra Jubaraj, 1 W. R., p. 194: and Bir Chandra *vs.* Nilkissen, 1 W. R., p. 177; and the same case in appeal before the Privy Council, 12 Moore's Indian Appeals, p. 523.) In all these suits the parties have submitted to the jurisdiction, and the title to the raj has practically followed the decision as to the title to the zemindari. Finally we find that the Rajah Bir Chandra (the respondent), although recognized as *de-facto* Rajah pending the former litigation, was not recognized by the British Government as rightful or permanent Rajah until his title to the zemindari had been confirmed by the Privy Council by its decree of the 17th March 1869.

Thus, the title to the raj has been in this manner made, by the parties themselves, to depend as it were on the title to the zemindari, and it is difficult now to hold that the Civil Courts have no jurisdiction to deal with the latter. Besides, though the Rajah of Tipperah is an independent power, it may be doubted whether he occupies, with relation to British India, precisely the same position as a foreign sovereign power in the full sense of that term. His recognition by the British Government seems to be less a matter of right than of discretion on the part of our Government. Thus, in the letter of the Secretary to the Government of Bengal, dated 19th September 1862, it is said that the "Lieutenant-Governor is pleased to recognize Bir Chandra Thakur, the uterine brother of the late Rajah, as the *de-facto* Rajah of Tipperah, leaving him or any others to take such steps in respect to the zemindari of Roshnabad, as they may think proper for their own interests." This was merely a recognition of him as the person in actual possession of the raj, pending the decision of his rights, and, therefore, no *khelat* was given. As soon as the High Court (September 1864) decided that the right was with Chandra, he applied to the Government recognized as *de-jure* Rajah, resting his on the decision of the High Court. Pe the appeal to the Privy Council, how no khelat was given, and the Rajah rem unrecognized, save as being the actual po sor of the raj. But, as soon as the dec of the High Courts was affirmed by Majesty in Council, Government recog him as *de-jure* and permanent Rajah. Ulick Browne, then Commissioner of Ch gong, was sent by Government to Ag in Hill Tipperah, and formally installed as Rajah in the spring of 1870. The sun granted to the Rajah on this occasion by Lieutenant-Governor of Bengal, dated 9th March 1870, was filed in evidence this suit by the respondent. It was to following effect: "The petition which Y "Honor pleased to make on the demis "Eshan Chandra Manikya Bahadoor, the "Rajah of Hill Tipperah, requesting to "placed on the throne of the Raj, has "been forwarded to His Honor the Li "nant-Governor, the usual *khelat* (hono "dress) has been received with orders to "effect that, on Your Honor's paying "beforehand one hundred and twenty- "gold mohurs as nuzzur (present), the hon "ary dress would, as a favour, be given to Y "Honor, and Your Honor would be placed "the throne of the Raj of the Tipper "Hills. As Your Honor has, under "said order, paid in the 125 gold mohurs "nuzzur, I, in the name of Her Majesty, th "Queen of the British Empire, do mak "over to Your Honor the khelat receive "and instal Your Honor permanently on th "throne of the Raj of the Tipperah Hills "I hope Your Honor will remain to rule th "Raj of the Tipperah Hills with good be- "haviour and by dispensing justice. The "19th March 1870."

The position of a petty Rajah of a wild hill district on the British frontier is, in truth, scarcely that of a sovereign power in the ordinary sense in which that term is applied to a European power, and I may add that, as regards two of the older Rajahs, Indor Manika and Oodya Manikya, they appear from what is stated in the report of Ramganga Deb's first case (1 Sel. Rep., p. 271) to have been not altogether independent powers, for they were installed under sunnuds from the Nawabs of Moorshedabad and Dacca, respectively.

Altogether, I think that the District Judge was right in holding that, so far as regards the parties before him, the Civil Courts have jurisdiction to deal with the suit, relating as it does exclusively to the title to a zemindari in the British territory.

I also agree with Mr. Fowle in thinking that the plaintiff is not concluded by the proceedings and decision in Nilkissen's suit. His rights were, in truth, never discussed or adjudicated upon in any way in that suit. If he was by his guardians a party to that suit at all, he was not so as one whose position and claim were placed before the Court for adjudication, or who was entitled to be heard. In the Court of first instance (the Court of the Principal Sudder Ameen), the plaintiff's mother, Joteshwari, and the two Ranees, Raj Lakshmi and Chandreshwari, widows of the late Rajah Eshan Chandra, applied as guardians of the minors Nobodip Chandra and his younger brother Rohinee Chandra, to be made defendants in the suit, under section 73, Act VIII. of 1859, "and that the suit be justly decided after taking evidence from us." This application was made on the 14th Bysack 1271, or 25th of April 1864, when many of the witnesses in the cause had already been examined. The order passed by the Principal Sudder Ameen was: "It "does not appear necessary to make defend-"ants of the petitioners and take evidence "from them. They may remain as third "parties, and the case be decided in their "presence." So that, without being made parties to the suit to any good purpose, they were permitted to "remain" in the very ambiguous and dangerous position of "third parties"—whatever that term may have been supposed to mean. Subsequently, however, a vakeel seems to have attended at the trial on behalf of the ladies; and to at least one of the later witnesses a few questions were put by way of cross-examination by that vakeel. The decree of the Principal Sudder Ameen is dated the 11th of June 1864, and recites that the case came on in the presence of the vakeels "for the petitioners," the Ranees, and that the statements made by them were duly considered.

At a later stage of the proceedings, the Ranees seem to have been more formally placed on the record as respondents in the appeals before the High Court and before the Privy Council. But nevertheless the claims of the present plaintiff, Nobodip, were never really asserted, or considered, or adjudicated upon, and their Lordships of the Privy Council in their judgment expressly declared that they dealt with the suit simply as an ejectment between the brothers Nilkissen and Bir Chandra, although they proceeded to decide, as between those two, that Bir Chandra had in fact been appointed Jubaraj by Eshan Chandra immediately before the death of the latter.

Not only, however, was Nobodip's position never inquired into or adjudicated upon in the former suit, but it is shown by the evidence, which is before us in this suit, that there was no real or independent representation of Nobodip by the Ranees. They were then living with, and wholly under the control of, Rajah Bir Chandra (the respondent in the appeal) at the *Rajdhani* or Palace in Independent Tipperah, and every step taken in their name in the course of that litigation

was taken in fact by Bir Chandra and his agents, though, no doubt, with the general assent and authority of the ladies. Their denial of all knowledge that there was any suit brought by Nilkissen or Chuckradhaj is absurd. At the same time, it is highly improbable that these ladies had any detailed or accurate knowledge of what was done in their name. As to the mukhtarnama (Exhibit No. 7) which is so hotly contested, I have no doubt they affixed their seals to it, and knew that it authorized action in their names as guardians of the minors, but there is no good reason for supposing that they had any detailed knowledge of its contents. Mr. Fowle says truly that it is not in accordance with the ordinary habits of native ladies of this sort that they should be told, or should know anything more about it than, generally, that it was a mukhtarnama for the purpose of getting them made parties as guardians of the minors.

There can be no doubt that the Ranees (in which term I include Joteshwari) at that time, and throughout the former litigation, supported Bir Chandra in asserting that he had been appointed Jubaraj by Eshan Chandra. They then concurred in his story that Eshan Chandra had appointed Bir Chandra *Jubaraj*, his (Eshan Chandra's) son Brajendra Chandra *Bara Thakur*, and his son Nobodip *Karta*, and this was the case made by Nobodip himself (the plaintiff), even after he attained majority. That this is so is shown by his letter dated July 9th, 1870 (Exhibit No. 3), to Lord Ulick Browne, written by him when (as he states in the letter) he was nearly 18, and by his memorial to the Lieutenant-Governor of Bengal, dated the 25th of January 1872. These documents give us the view which Nobodip himself took of his position shortly after he attained the age of majority according to Hindoo Law.

It is evident that it was not until Bir Chandra (Brajendra Chandra having dead for some years), feeling himself firm seat as Rajah, threw off Nobodip, and de his intention of appointing his own Jubaraj, that any doubt was cast by No or his party on the truth of the story the appointments made by the late Eshan Chandra. Rightly or wrongly, idea which the Ranees and Nobodip had, about the time when Bir Chandra dec he would make his son Jubaraj, wa Nobodip was to succeed Bir Chandra, the idea was at first entertained, profe at any rate, by Bir Chandra also.

As to the issue whether the late Eshan Chandra did make the appoint of Jubaraj, and as alleged, it is enou say that I again agree with the D Judge in holding that he did. I do take the decisions of the High Court the Privy Council upon this point in former suit as conclusive against the pr plaintiff, and I quite admit that, on evidence, as it is now placed before us, is much which may reasonably be acc as supporting the plaintiff's contention. the question was in the former suit tested hotly and perfectly *bonâ fide*, so f Nilkissen, the then plaintiff, was concer Many of the witnesses who gave evid in that suit also give evidence in this The evidence of the plaintiff's witnesses in no degree of a better class than the dence of the defendant's witnesses—r the reverse. The conduct of the plai himself, even for some time after he c of age, as well as that of the Ranees, strongly corroborative of the respond story, though these ladies and the plai now declare that story to be false. And t Rajah Bir Chandra has been acknowledged the British Government as Rajah, *de facto* *de jure*, ever since Eshan Chandra's death 1862. Add to this that the reasons given the High Court and the Privy Council f

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ing it proved that Eshan Chandra did the appointment, as alleged, apply t equally to the evidence now before us. ng the force of the reasons then given adopting them, and looking at the whole nce before me, I find as a fact that the Rajah Eshan Chandra did appoint Bir ndra to be *Jubaraj*, and Brajendra Chan- o be *Bara Thakur*, and Nobodip to be *da*. I have very carefully considered evidence in all its details, and think this e right conclusion. Much reliance is ed by the Counsel for the plaintiff on the ence given as to this by the plaintiff's her and the Ranees Raj Lakshmi and ndreshwari. But, in the view I take of r earlier conduct, and of the support n by them to Bir Chandra, so long as y believed that the succession to Bir andra would be according to the intention Eshan Chandra, I cannot say that the dence which they now give as to this tter is of any value.

Being of opinion that Bir Chandra was ointed by Eshan Chandra to be Jubaraj, s scarcely necessary to go further into case, as the appeal must be dismissed. der the circumstances, however, it is per- s better that I should express my opinion some of the other points much discussed fore us.

The District Judge finds that Joteshwari s a wife married in the *shantigrihita* form, d that Nobodip is, therefore, a legitimate n of the Rajah Eshan Chandra; and I rive at the same conclusion. There is e direct evidence of the witnesses who epose to their having been married, and, in ddition to that, several important matters re proved which are strongly corroborative of the view that Joteshwari had the status of a wife. One is, that Rajah Eshan Chandra certainly treated Nobodip as if he were a legitimate son, and believed him to be capable of inheriting. This is shown by (amongst other things) the letter of Lieutenant Graham (Exhibit No. 7) and by the roobakari announcing the appointment of Bir Chandra as Jubaraj, on which Bir Chandra's title mainly rests. This roobakari (Exhibit No. 8) is dated the 16th Sravan 1272 Fuslee, or 30th of July 1862, and in it Eshan Chandra mentions his two sons, Brajendra and Nobodip, as if they were on a footing of perfect equality, save that one was older than the other. He speaks of "my first son, Sriman Brajendra Chandra Thakur," whom he appoints Bara Thakur, and "my second son, Sriman Nobodip Chandra Thakur," whom he appoints Karta. It is highly improbable that he would have designated his son in this manner if Nobodip had been illegitimate and incapable of inheriting; and it is to be borne in mind that this roobakari was put forward and is relied on by Bir Chandra and his party, and never has been objected to as not describing the sons of Eshan Chandra properly.

Then Eshan Chandra gave each of his sons—the sons of Joteshwari as well as Brajendra, whose legitimacy is admitted—a talook by way of maintenance. The document creating the talook in favour of Nobodip (Exhibit No. 4) declares that the land is given to "Srila Sriman Nobodip Chandra Rajkumar as Chakbust." This talook was resumed by Bir Chandra when he quarrelled with Nobodip. In resuming it he speaks of it as "Chakbust "Nobodip Chandra Nugger, the *sarkari* "talook of Srila Sriman Nobodip Chandra "Thakur." This letter is dated the 4th Asar 1281 Fuslee, or the 17th June 1871, and the date is of importance when it is noted that the word "Thakur" is used in lieu of the "Rajkumar" of Eshan Chandra's letter, for I agree with Mr. Branson in his arguments that the designation of "Rajkumar" would not have been used as regards an illegitimate son. Again, the correspond-

ence of Bir Chandra and his people, which has been put in evidence (and as to the genuineness of which I have no doubt), proves, as does all the evidence as to Bir Chandra's conduct, that it was not until many years after the death of Eshan Chandra that he began to profess to consider Nobodip to be nobody, because illegitimate. Finally, it is clear, and Bir Chandra admits it to be true, that a considerable party in and about the palace at Agartola wished Bir Chandra to appoint Nobodip Jubaraj. This, it appears to me, could scarcely have happened had they doubted his legitimacy, for it would seem that no one who is not born of a wife (married by one form of marriage or another) can inherit the Raj.

There is one matter which may fairly be said to tell against the idea of Joteshwari having been a wife. I refer to the manner in which she is designated in the mukhtarnama (Exhibit No. 7) already mentioned, and to her seal on this document. In its commencement, the three ladies describe themselves thus: "We, Maharanee Raj Lakshmi Moha-"debya, Maharanee Chandreshwari Mohade-"bya, and Srimati Joteshwari Debya, the wi-"dows of the late Maharajah Eshan Chandra "Manikya Bahadoor, and mothers and guar-"dians of Sriman Nobodip Chandra *Karta*, "and Sriman Rohini Chandra Rajkumar, "minors, &c.," and the seal of Joteshwari is quite different from that of the other two who are admittedly wives. It will be observed that the two admitted wives are "Maharanee" and "Mohadebya," while Joteshwari is only "Srimati" and "Debya." There is the same difference in the seals, and, besides, Joteshwari's seal is oval, while those of the others are round. This certainly tends to indicate that Joteshwari was inferior in some respects to the others. But, again, if Joteshwari was not a wife, how is it that we have those who were admittedly wives joining with her, and calling her a widow, and treating Nobodi legitimate son, whose interest they, as as Joteshwari, were bound to protect? If had believed Nobodip to be illegitimate would have been impossible, and it also have been without any object, fo illegitimate, he had no rights to asse protect.

The matter is not altogether free doubt; but, looking at the whole evidenc the record, I consider it proved that Jot wari, before she became the mother of N dip, was married to Eshan Chandra in *shantigrihita* form, and was not a mere cubine; at the same time I think it p clear that she did not occupy so high a p tion as Raj Lakshmi or Chandreshwari, it is not unlikely that, though a wife a Ranee, she was in the somewhat inferior p tion which has been spoken of as tha *Kachua* Ranee.

In my opinion, this appeal ought to dismissed with costs.

Morris, J.—I concur generally in conclusions just expressed.

The considerations which seem to b with greatest force against the factum the nomination of Bir Chandra to Jubarajship are those which arise out of extreme suddenness of the act, the abse of all previous notifications, preparation, apparent necessity for it, and the coincide that an event so important in its results Bir Chandra should have occurred within l than twenty-four hours of the death of Ra Eshan Chandra, he being at the time, thou suffering from the effects of a paraly stroke, in no suspicion of danger, and better or worse than usual. To these m be added the improbability of Eshan Chand allowing the succession to pass from his ow sons, of whom the eldest was unquestionabl legitimate, in favour of a brother. But none of these considerations present an insuperable obstacle to the fact of the nomination, and

all of them taken together fail to carry us farther than the region of probabilities. On this question, the evidence produced by the plaintiff is certainly not of a high order of merit. No one piece of evidence stands out in marked prominence of such convincing force and so unimpeachable in its character as would enable a Court to say with confidence that the story of the Jubarajship of Bir Chandra is false, much less would it justify a Court of Appeal disturbing the conclusion in the opposite sense arrived at by the Court of first instance. A strong body of witnesses speak directly to the nomination as made in their presence by Rajah Eshan Chandra. They are men of rank and position, and, taken as a whole, they are superior in status to the witnesses whom the plaintiff has called, and who say that, at the time and place referred to, they, though present, saw no ceremony of the kind take place. It is impossible to ignore the fact that this issue was fairly tried out at the time when the event was recent. Out of twenty witnesses then examined, six have died, and eleven have repeated what they said before in favour of Bir Chandra. The plaintiff has called some witnesses, who were not produced before, but their evidence is not without defect or taint of suspicion, and it is not so strong and so independent in its character as to outweigh the direct testimony on the other side. In respect to these witnesses, with the exception perhaps of the ladies, the Ranees, the remark may be made that, if their evidence was of weight, it is likely that it would have been given at a much earlier date. Nor, if the probabilities be taken into account, does the balance by any means incline to the side of the plaintiff. The history and *kulächär*, or family custom of the Rajahs of Tipperah, have been brought under notice. From these it is apparent that the present is far from being the first instance of a Rajah appointing a brother to be Jubaraj in preference to his own son. Even Rajah Eshan Chandra, whose nomination is now contested, when he ascended the throne, appointed another brother, Upendra Chandra, who predeceased him, to be Jubaraj. Judging from the evidence, perfect freedom in selection is the rule of the family; it is also essential that the Jubaraj should be an adult and fit to assume at once on any emergency the reins of sovereignty. It is usual to appoint the Jubaraj on the occasion of the accession of a Rajah. This is the first act of sovereignty, so to speak, of the new Rajah; the ceremony of appointment of Jubaraj being necessarily of minor importance and subsidiary only to the grander ceremony of the installation of the Rajah himself. In proof of this, if we turn to p. 236 of the paper-book, we find Rajah Eshan Chandra thus describing the family custom in his letter to the Commissioner, dated 24th November 1859: "For the ever-existing custom is that whoever becomes the Rajah, he has the power "to appoint, according to his own discretion and choice, any person Jubaraj whom "he may think fit for the post amongst his "own sons, brothers, or brothers' sons. "The post was never given by rule of primogeniture, of which there exists sufficient "proof;" and in the sunnud which the British Government, through the Commissioner, Mr. Torrens, presented to this Rajah, Eshan Chandra, on the occasion of his installation to the throne, it is expressly declared (see p. 234): "The said Maharajah, "in accordance with the practice of the successors of the Rajahs of old, appointed under "his own authority and power Upendra "Chandra Thakur, his younger brother, as "the Jubaraj." Again, Jagamohan Shuba, who is the Shuba or head of the Thakurs, and necessarily familiar with the custom, has deposed thus (p. 418): "I saw the installation of Eshan Chandra Manikya as "Jubaraj by Kristo Kishore Manikya, and

"of Upendra Chandra by Eshan Chandra "Manikya. The Rajah did not mount the "throne for the purpose of appointing "the Jubaraj; but, as the Jubaraj "was appointed at the same time when "the installation of the Rajah took place, "he sat on the throne. These Rajahs "have no such custom as would require the "performance of any ceremony for the "installation of Jubaraj. Ceremonies and "rites are performed and observed when the "Rajah ascends the throne." And, finally, from Rajah Bir Chandra himself, we learn that he did not appoint his own son, Radha Kishore, to be Jubaraj till he was fifteen or sixteen years of age. The conclusion, therefore, to which a consideration of these circumstances and the particular facts of this case appear to me to point, is this, that Rajah Eshan Chandra maintained and asserted absolute freedom of choice on his part in the selection and appointment of a Jubaraj; that, on his accession, he actually appointed one brother Jubaraj; that, after that brother's death, he purposely delayed to appoint a successor in the hope, as expressed in the letter of Lieutenant Graham, that, in three or four years' time, his sons would be old enough, the one to be Jubaraj, and the other Bara Thakur; and that shortly after he was prostrated by a stroke of paralysis, and died within one year of the date of Lieutenant Graham's letter, having on the day preceding his death appointed his brother, Bir Chandra, to be Jubaraj. It may very well be that Rajah Eshan Chandra felt that his end was nigh, or, at any rate, there was no prospect of his surviving till his eldest son had attained years of discretion, and that he, suddenly, that is, without any general previous intimation of his intentions, took advantage of the opportunity which the opening of the *nutan dalán* of his palace afforded him, to invest Bir Chandra with the Jubarajship, and to make his eldest son Bara Thakur, and second son Karta; the cere of their investiture being simple in ch ter, and needing little or no preparation.

Again, in this connection, the letter d July 9th, 1870, addressed by the plai Nobodip himself to the Commissioner, the subsequent petition, dated January 1872, addressed on his behalf to the Go ment of Bengal, are of extreme significa Nobodip admits that he wrote the le It is manifestly the outcome of the yo man's indignation at what he consider his uncle's duplicity in departing from word and refusing to recognize his (No dip's) right to be Jubaraj. Both in this let and in the petition of two years' later d it is the loss of the Jubarajship, and only which touches him keenly, and for wh he seeks redress and the help of the Brit Government. Not a word is said, as is now, and ought to have been said then, Bir Chandra being an usurper, and having attained the Raj by means of cunningly devised fraud. Only in the la part of the petition is there a vague to shadowing of the present claim. But Co of Justice will necessarily look with extre suspicion upon a suit brought under su circumstances as these. We have here case of a plaintiff, who, though capable understanding, and indeed fully cognizan of his own rights, avowedly sets up a tit which is utterly inconsistent with tho rights. Failing in this, he, after an interv of more than two years, seeks to resuscita the title which he had practically abjured and, with a variety of ingenious pleas, desires the Court to excuse and ignore his previous proceedings. These two documents must be considered as of the utmost importance, they serve materially to strengthen the case of Bir Chandra in the matter of the Jubarajship, and they reveal the real history and foundation of the suit. It is evident that the suit would never have been insti-

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or the royal family of Tipperah into its present state of discord, but refusal of Bir Chandra to recognize dip as Jubaraj. Bir Chandra himknowledges this. He says (p. 385): ve appointed my son to be Jubaraj. de the appointment after the British rnment installed me as Rajah. Before made that appointment, I was pressed Raj Lakshmi and Chandreshwari, the aranees, to appoint Nobodip Chandra raj. When I appointed my elder son raj, his age was about fifteen or sixteen s. Even if I had no children, and a wish to appoint Nobodip to the e of Jubaraj, I could not do so is illegitimacy was an insurmountable ction. Up to the time that I had refuse Raj Lakshmi her request to oint Nobodip Jubaraj, she had not n either on good or bad terms with me. ce the time that I refused her, she has n on bad terms with me. Chandreshwari a talook called Mouzah Taist. That ok has been resumed. It was resumed r I had appointed my eldest son Juba- After I had refused Chandreshwari to oint Nobodip Jubaraj, she was on bad ns with me, the same as Raj Lakshmi . Her ill-feeling was increased when the ok was resumed." Thus, on Bir Chand- own showing, both the Maharanees e late Rajah Eshan Chandra, as also two e principal officers of State, pressed him ake Nobodip Jubaraj, and it is highly obable that they should have done so, if odip had been really illegitimate, and, fore, ineligible. The opposition of the aranees which they carried to the length ffering exile and loss of property, and of the counsellors who incurred there- degradation and the disfavour of the ning Rajah, are intelligible only on the othesis of Nobodip's legitimacy, and r conviction of his right to be Jubaraj. On the other hand, the plea of Nobodip's illegitimacy was clearly the only plea which Bir Chandra could urge and which afforded him a plausible, and at the same time reasonable, excuse for passing over Nobodip, and giving the Jubarajship to his own son. Viewed in this light, the conduct of the parties in this suit, and the extravagant lengths to which many of the witnesses on both sides have gone, can, to those familiar with Indian litigation, be readily understood; and warrant is afforded for believing that the case of each rests upon a basis of truth. When, for example, Bir Chandra affirms that "neither during the lifetime of Eshan Chandra, nor after his death, was Nobodip called Rajkumar, it is evident that he chooses to ignore the fact that Rajah Eshan Chandra, in the grant of land, a chakbust, which he made in favour of Nobodip, called him "Srila Sriman Nobodip Chandra Rajkumar." This very denial in this respect shows the importance which he attached to the word Rajkumar, and adds extreme significance to the use of the term Thakur, in lieu of that of Rajkumar, which he makes in his order withdrawing the chakbust from Nobodip. So, too, in respect to the letters addressed by Bir Chandra to Anand Behari Sen, and the correspondence between the chief officers of the Rajah at Agurtola and the agents employed in Calcutta. The genuineness of these letters cannot be doubted, nor can their importance, as showing the view entertained in 1864 by Bir Chandra and his principal officers of the status of Joteshwari and Nobodip. The attempt, therefore, on the part of Bir Chandra, to deny, not only his signature on some of them, but also all knowledge of the correspondence, speaks for itself and defeats its own objects. In like manner, turning to the other side, we see the Maharanees Raj Lakshmi and Chandreshwari not hesitating to deny all knowledge of, or part taken by them in, the previous suit

of Nilkissen *vs.* Bir Chandra. The language and behaviour of these ladies before the Commissioner, although it says much for their determination to espouse at all risks the cause of Nobodip, says little for their discretion or general credibility. The same may be said of the explanation tendered by Nobodip of the circumstances under which the letter of July 9th, 1870, and the petition of January 25th, 1872, were written. It is more ingenious than real, and is merely an attempt to strengthen his own case and to get rid of the effects of his previous imprudence. It seems to me clear, therefore, that there are faults and exaggerations on both sides, and that these faults and exaggerations are the natural growth of the struggle arising out of the refusal of Bir Chandra to nominate Nobodip Jubaraj. On the one hand, Nobodip strikes a blow for the Raj by impugning the nomination of Rajah Eshan Chandra, which has given Bir Chandra the throne, and, on the other, Bir Chandra retorts by branding Nobodip with the stain of illegitimacy and aspersing the character of Joteshwari.

That Nobodip is the legitimate son of the late Rajah Eshan Chandra by Joteshwari, whom he married in the *shantigrihita* form, is, I think, the conclusion to be drawn from the evidence in this case. The point on which a doubt may fairly arise is as to the exact status of Joteshwari as wife of Eshan Chandra. It is highly improbable that Bir Chandra would have made this attack upon her, if there had not been something in her antecedents which afforded ground for it, and which rendered her position somewhat different from that of the other Maharanees. In the matter of personal allowances, she was on the same footing as the other Ranees, and her sons were treated and wore dresses and ornaments like any other son of the Rajah. In all the documents in the previous suit in which her name appears, she is spoken of as the wife of Eshan Chandra, and mother of sons, Rajkumars; and to when these documents were put in, Bir Chandra made no objection. the same time her official designation less honorary than that of the other Ra She is described as *Srimati* and *Deby* not *Maharanee* and *Mohadebya*. Her too, as it appears on the mukhtarnam different in shape and bears a differe scription from theirs. It is subject of su that none of the members of her own f have been produced to speak positiv the circumstances under which she brought from Dacca to Agurtola, an position accorded to her and her fa The evidence goes to show that she di rank higher than a *Debya*, and was, in what is termed *Kachua Ránee*. But I nothing in these designations incomp with the fact of her being a Ranee an lawful wife of the Rajah. It is ma that the people of Tipperah, from the Ra downwards, are very primitive, and that their manner and customs, they by no me follow the strict tenets of the Hindoo relig The *gandharva* or *shantigrihita* form marriage is commonly adopted. It is si in character and requires little cerem At the same time a marriage in this f is binding and perfectly valid. The Raj do not appear to have been particular their choice of wives. In p. 266, we le that a previous Rajah, Ramganga Mani was the son of a slave-girl (or Kach Jagamohan Shuba, a witness already refer to, gives important testimony on this po He says: "The custom of having *Kach* also obtains with the Tipperah Raj famil Maharajah Krishto Kishore Manikya h *Kachua*. The mother of Shubesh Krish and Shitijay is the *Kachua* of the sa Rajah. The mother of Nobodip Chandra i the *Kachua* of Eshan Chandra Manikya." I gather clearly from this that a person

as a *Kachua* was not a mere con- but that it was a recognized custom country that the Rajah could take a to wife. In confirmation of this view, the evidence of Ranee Bhubaneshwari). She says expressly: "Joteshwari called a *Kachua*, she was Dassi to hali." And again: "All the Ranees assis and Bandis, a Dassi is not called Dassis cannot have any seals; Ranees mmarees are called Debyas." Now, as ari had a seal, and bore undoubtedly ignation of Debya, the testimony of ness, who is most hostile to Joteshwari, ngly corroborative of the view that ari was a Kachua Ranee, and wife of Eshan Chandra.

the whole, then, I am of opinion that aintiff has satisfactorily proved his acy, but his suit fails on the point of arajship, and the appeal must, there- e dismissed with costs.

The 11th May 1876.

Present:

Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

ation—Over-payment—Deposit—Article 147, Limitation Law.

Case No. 1998 of 1875.

l Appeal from a decision passed the Additional Judge of the 24-gunnahs, dated the 22nd July 1875, ersing a decision of the Second Sub-inate Judge of that District, dated 10th May 1875.

ha Nath Bose (Defendant), *Appellant,*

versus

Bama Churn Mookerjee (Plaintiff), *Respondent.*

r. Trevelyan and *Baboo Sham Lall Mitter* for Appellant.

Baboo Bhowani Churn Dutt for Respondent.

Where there was a contract between plaintiff and defendant that defendant should purchase a dwelling-house benamee on account of plaintiff, and re-convey it to plaintiff on his paying up in instalments a certain sum of money with interest, and plaintiff, seven years after his last payment, sued to recover some payments which he had made in excess of his agreement, and the first Court dismissed the suit as being barred by limitation, but the second Court decreed the suit on the plea that the plaintiff's payments were deposits, and fell within article 147 of the schedule of the Law of Limitation, HELD by the High Court that article 147 applies to deposits recoverable in specie; that plaintiff's payment in this case was a simple over-payment; and that the recovery of it was barred by limitation under article 60.

Jackson, J.—THE plaintiff sued to recover a sum of money overpaid to the defendant in respect of an agreement between them to the effect that, on a certain sum of money, being the amount of purchase-money, being paid to the defendant with interest at one per cent. per mensem by successive payments, the defendant was to re-convey to the plaintiff a certain dwelling-house which the defendant had purchased in benamee. The plaintiff, who seems not to have kept his accounts very carefully, went on making payments until they amounted to Rs. 6,359. It appears that the whole sum due to the defendant under the agreement, including interest, was Rs. 5,039. The defendant in the first place refused to carry out his agreement or to re-convey the house, and the plaintiff had to sue him and compel specific performance of that, which was done. Having done that, the plaintiff, in accordance with the declaration made in the first suit, brought the present suit to recover the surplus money seven years after the date of the last payment.

The defendant pleaded limitation, and the Subordinate Judge, Baboo Brojendro Coomar Seal, was of opinion that the suit was barred. He considered that the plaintiff's claim came under article 60 of the Second Schedule of the Limitation Act. Taking this view he dismissed the plaintiff's suit.

The plaintiff appealed, and the appeal was heard by Mr. Beaufort, the Additional Judge of the 24-Pergunnahs. Before Mr. Beaufort it was contended (what had been unsuccessfully contended before the Subordinate Judge) that this amount was in deposit, and that contention, which the Subordinate Judge had declared to be untenable, and in respect of which he thought no remark was necessary, appeared to the Judge so satisfactory that he adopted it. He thought it was a deposit, and applied to the case article 147, which gave the plaintiff 30 years. It appears to us that the conclusion of the Additional Judge cannot be supported. Article 147, we think, applies to a deposit which is recoverable in specie. This was nothing of that sort. It was a payment, an over-payment, made by the plaintiff to the defendant upon the supposition that it was due, that is to say, a payment by mistake, and that, we think, is a case which comes, as contended by the learned Counsel for the special appellant, under the head of money had and received, and, therefore, under article 60 of the Second Schedule of the Limitation Act. Even if that article would not apply, the suit would certainly come under the general article 118, which applies to cases for which no special provision is made, and consequently it would be a case to which the six years' rule would apply. The present case is one where more than seven years have elapsed, and, therefore, the suit is too late. We think the Subordinate Judge took the right view, and that his judgment must be restored, that of the Additional Judge being reversed. As the conduct of the defendant was not at all good, we allow him no costs of this appeal. He will have his costs of the lower Courts.

The 12th May 1876.

Present:

The Hon'ble Louis S. Jackson and W. McDonell, *Judges.*

Prejudice to Rights by Appearance in a Case Evidence.

Case No. 2173 of 1875.

Special Appeal from a decision passed the Officiating Judge of Backergunge dated the 6th July 1875, affirming decision of the Officiating First Subordinate Judge of that District, dated 28th September 1874.

Ain Ali and others (Defendants), *Appellants,*

versus

Juggut Chunder Roy Chowdhry and ors (Plaintiffs), *Respondents.*

Baboos Rash Beharee Ghose and *Dwarkanath Mohun Dass* for Appellants.

Baboo Huree Mohun Chuckerbutty for Respondents.

Where plaintiff and defendant in a suit had both been defendants in a former suit, in which defendant had requested to be allowed to appear as a defendant, under a common misapprehension of the effect of s. 22 of Act VIII. of 1859, but had not been allowed to give evidence, HELD that defendant was not in this suit prejudiced by the decision in the former case, which could not be conclusive as to any right of his, regarding which he had not furnished evidence.

Jackson, J.—THE only point which arises upon this case is that which is raised by the passage in the judgment of the Lower Appellate Court near the end of these words: "But for the High Court's decree I should have felt inclined to award defendant No. 4 a partial decree for the part of the land which the Ameen has found, on local inquiry, to appertain to appellant's kharija talook Bukhtiar Shah." "I think that the High Court's decision dated 18th May 1866, must be held to be final," and a few lines above that the Judge had explained this view by saying

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appellant was a party to that suit, and High Court decreed the whole case our of plaintiffs, respondents, he did e how the appellant could now come rd and raise any claim. Now, the facts t case, it seems, were that the suit, came before the High Court in l, was one to which the present defend- were not originally parties, but they ill advised enough to ask to be brought e record as defendants, under a very on misapprehension as to the effect of n 73 of the Civil Procedure Code. ppears that, although they were allowed pear, they were not permitted to give evidence; and in the result the suit was issed, that is to say, the claim of the iffs in that suit was thrown out. But rally, as both the plaintiffs and the dants in the present suit were defend- in that suit, nothing was or could be rmined between them; and, even if it possible to determine anything between , the Court would not permit that to one unless these appellants had been ed to give all the evidence which they to offer. The Judge, therefore, is in in saying that the decision of the High rt is conclusive as between the present ies. Now the Judge intimates an ination to award to defendant No. 4 a ial decree for some part of the land, if ere not for the view he took of the h Court's decision. It is uncertain ther he would have given any such ree or not, and it is necessary, therefore, the case should go back to him in order he may further consider that matter. e decision in question is not of course clusive as already observed, but it must taken for what it is worth, it being always ne in mind that the present special pellants as parties in that case were not owed to offer any evidence. The costs this appeal will abide the result.

The 25th May 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

A Rent-suit is a Civil Suit—Effect of Act VIII. of 1869 (B. C.).

Case No. 2259 of 1874.

Special Appeal from a decision passed by the Judge of Sarun, dated the 15th June 1874, reversing a decision of the Subordinate Judge of that District, dated the 3rd April 1873.

Moulvie Ahmed Kubeer (Plaintiff), *Appellant,*

versus

Mr. J. Mackrae, Manager of the estate of Moulvie Mahomed Abdool Hye, and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Chunder Madhub Ghose and *Moonshee Mahomed Yusuf* for Respondents.

Where a suit relating to land was brought as a civil suit, and received by the first Court, but thrown out by the Appellate Court on the ground that it should have been brought under Act VIII. of 1869 (B.C.), HELD that Act VIII. merely restored to Civil Courts the powers taken from them by Act X. of 1859; that it rested with the presiding officer, and not with suitors, to classify suits in accordance with the provisions of the law; but that the Judge was wrong in dismissing a rent-suit, because it was brought as a civil suit.

Jackson, J.—THE respondent very reasonably says that he will not support the judgment of the Court below, and we are quite clear that the District Judge was wrong in reversing the judgment of the Court of first instance, and dismissing the suit on the ground that the suit ought to have been brought under Act VIII. of 1869 (B. C.), and not as a civil suit. Act VIII. of 1869 merely restores to the ordinary Civil Courts the power taken from them by Act X. of 1859 in suits connected with arrears of rent and such like matters between zemindar and ryot, and they are, after the passing of Act VIII., instituted

in Civil Courts just in the same manner as any other suits. The Legislature, no doubt, have thought fit that suits of that description should be entered in a separate register, but that is a matter for which the officer of the Court, and neither the plaintiff nor the defendant, is responsible. In matters which constitute a good cause of action, it is for the Courts to apply the law, and the Judge, therefore, was wrong in dismissing the suit of the plaintiff on such a ground. We are not in a position to give final judgment in this case, because it is not clear that the plaintiffs were entitled to a judgment merely upon the pleadings. The case will have to go down for a new trial by the Lower Appellate Court. It may well be that the defendants failed to make out a right of occupancy or any superior right. For all that it does not follow that they are liable to be ejected without notice. The costs of this appeal will follow the result.

The 26th May 1876.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Eviction—Landlord and Tenant—Trespassers.

Case No. 3018 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 1st September 1874, affirming a decision of the Moonsiff of Behar, dated the 31st January 1874.

Chowdhry Thakoor Sahoy *alias* Mahadeo Dutt and others (Plaintiffs), *Appellants,*

versus

Ram Awtar Singh and others (Defendants), *Respondents.*

Mr. M. L. Sandel for Appellants.

Baboo Bama Churn Banerjee for Respondents.

Where a ticcadar, representing the sixteen shareholders of an estate, put certain tenants in possession of some land, and the owners of a nine-sixteenths share in the same land sought to evict the said tenants as trespassers, and the lower Court decided that the tenants were rightly in possession, and that the plaintiffs could not of themselves evict them, HELD by the High Court, which declined to interfere with that decision, that this suit was not a trial of any question between landlord and tenant, and that the decision did not anticipate the result of any suit framed for the purpose of the question whether, as tenants, the defendants could be evicted.

Jackson, J.—IN this case the respondents' vakeel has not appeared, although we have waited some time for him. The special appellants come before us on this ground that they, being the owners of 9-16th of certain mouzahs, brought a suit against the defendants to eject them as trespassers, the defendants having been admitted as tenants by the ticcadar, who was then in possession on behalf of the 16 annas shareholders. The Moonsiff dismissed the suit, finding that the defendants were rightfully in possession as tenants. On appeal, the Judge, without discussing that question, decides the case merely on the point that the defendants could not be sued as trespassers, and that the plaintiff as being only owners of 9-16th could not of themselves eject the ryots. It appears that this was not a suit for the purpose of trying any question as between landlord and tenant. The defendants have been sued simply as trespassers, and the suit, by the decision of the Lower Appellate Court, having gone off upon what may be called a technical ground, it appears to us that this decision ought not to anticipate the result of a suit properly framed for the purpose of trying whether the defendants can be evicted as tenants. This declaration, we think, may be properly added to the judgment of the Lower Appellate Court. In other respects the appeal must be dismissed, and the plaintiffs pay all costs.

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The 29th May 1876.

Present:

he Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Co-contractors—Joint Liability.

Case No. 9 of 1875.

ular Appeal from a decision passed by e First Subordinate Judge of Bhaugul-re, dated the 23rd of September 1874.

oos Mahtab Singh, Juggut Singh, and durjeet Singh (three of the Defendants), *ppellants,*

versus

dhooram Bhugut (Plaintiff), *Respondent.*

Mr. M. L. Sandel for Appellants.

abgos Mohesh Chunder Chowdhry and *Nilmudhub Sen* for Respondent.

here five brothers had made themselves jointly for a sum of money under a bond, and mort-d a certain mouzah as security for the debt; and mortgagee, having subsequently taken a separate from each of two of the brothers for one-fifth of the e amount, now sought to recover the remaining -fifths of the said amount from the remaining three ers, but the latter contended that the claim jointly held against all five could not be broken HELD that any one of the five might be sued for whole amount, and that the plaintiff was entitled ecover the three-fifths from the three brothers.

IN this case the plaintiff held a bond cuted by five brothers by which they re made jointly liable for the sum of 535 with interest, and by which they dged a certain mouzah belonging to em jointly as a security for the debt.

The plaintiff has since obtained from o out of the five brothers two separate nds, each for a one-fifth share of the debt; d he now sues the other three brothers r the remaining three-fifths. He has ade the remaining two brothers parties to e suit, but makes no claim against them.

The first three defendants, who are called pon to pay three-fifths, objected in their written statement that, as the bond was a joint one, the plaintiff could not bring a suit for part of the amount, releasing two out of the five obligees; and that the bond and mortgaged property being joint could not be divided without the consent of all the co-sharers.

This objection was not dealt with in the Court below, but it does not appear to have been abandoned, and it has been put forward again in appeal.

It is not very clear what points this defence is intended to raise—whether it is meant that the plaintiff, by releasing two of the obligees, has released all that is disposed of by section 44 of the Contract Act.

If it is intended that, upon a joint bond by five, the obligor cannot ask for a decree against three out of the five for their share of the debt, then, independently of the Contract Act, we think there is nothing in the law of this country which prevents his doing so on a contract between Hindoos out of Calcutta. There is nothing in this, as far as we can see, against either equity or good conscience or the intention of the parties. If the plaintiff had sued for the whole amount, he might have recovered the whole amount in execution against the three defendants. Surely, therefore, he can recover three-fifths of the amount against these same parties.

The only doubt arises upon the 43rd section of the Contract Act; that section is peculiar. It permits the promisee to compel any one of several joint promisors to perform the whole promise. It is very difficult to say what this means.

But, whatever may be the true construction of this section, we do not think it prevents the plaintiff doing what, in our opinion, he could have done before this Act, namely, in a suit brought against all the co-obligees claiming a decree against three of them only for three-fifths of the debt.

We confine our decision entirely to the case before us. We express no opinion on the general rights and liabilities of co-contractors or co-debtors.

We also express no opinion whatever whether the form in which this decree is obtained will in any way affect the plaintiff's rights when he comes to enforce his lien. The appeal is dismissed with costs.

The 31st May 1876.

Present :

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Ex-parte Judgment — Revival of Litigation— Lapsed Claims.

Case No. 1039 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 3rd June 1875, reversing a decision of the Moonsiff of Amtah, dated the 29th December 1874.

Judoo Nath Sircar (Defendant), *Appellant,*

versus

Sreemutty Elokashee Dabee (Plaintiff), *Respondent.*

Baboo Umbika Churn Bose for Appellant.

Baboo Gopal Chunder Ghosal for Respondent.

Where a judgment is given *ex parte* against a person, and his application to set aside that judgment is refused, and he makes no appeal against the order of refusal, the Courts ought not to encourage an outsider afterwards to come in and claim to have purchased the rights of that person, and to revive litigation over his lapsed claims.

Jackson. J.—It appears to us that the judgment of the Court of first instance in this matter was right in substance, and that the decision of the Lower Appellate Court is entirely erroneous. The suit is brought, as it is said, by Elokashee, but manifestly and for the benefit of one Dwarka Nath Chuckerbutty, to set aside a decision passed against Elokashee on the complaint of Prosunno Moyee Dassee, who, it is said, a under the instigation of Judoo Nath Si defendant No. 2, who is the special appe before us. It is not necessary to set the whole consequences of that pre suit, but it appears that judgment ha been given against Elokashee, she su under section 119 of the Civil Proc Code, to obtain a rehearing of her suit have the judgment set aside. That app tion was refused. She preferred no a from that judgment. She now says she has sold her rights and interests in aforesaid land and in suit No. 53 in re of the aforesaid land to one Dwarka Chuckerbutty, but, as, according to an executed by her on the same date, sh bound to bring this suit, she brings this accordingly. Now, as regards Elokas it is manifest that she, on her own acco had no interest whatever. She sold all rights to Dwarka Nath, she said she bro this suit on behalf of Dwarka Nath, surely no Court would countenance Dwarka Nath in the purchase, if ever did purchase and paid consideration for of the rights of Elokashee in such a She had a judgment given against *ex parte.* She sought to have that judgm set aside. Her application was refused. S might have appealed, but she did not appe and this Dwarka Nath voluntarily int duces himself in the matter and says has paid consideration and purchased t person's right to have the decree set asi It appears to us that such a suit ought ne to have been entertained, and the Subo dinate Judge was entirely wrong in reve ing the judgment of the Court of fir instance. The judgment of the Lowe Appellate Court is accordingly reverse with costs, and the judgment of the firs Court is restored.

This judgment will govern the other appeal No. 1310.

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The 7th June 1876.

Present:

Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

r Possession—Sale in Execution—Bond-—Decree conclusive as to the Propriety of —Immoral Loan—High Rate of Interest ndoo Law—Restrictions against Usury.

Case No. 104 of 1875.

ar Appeal from a decision passed by First Subordinate Judge of Bhaugul-e, dated the 18th January 1875.

. Luchmee Dai Kooree, mother and rdian of Baboo Deeg Narain Singh, nor son of Baboo Gobind Doyal Singh aintiff), *Appellant,*

versus

n Singh, Khuruck Singh, Kally Proshad, Moulvie Syed Rahmut Ally, who eared, and Baboo Gobind Doyal Singh Mr. William S. Crowdy, Manager of Indigo Concern at Bhaugulpore, who not appear in this appeal (Defendants), *pondents.*

Ameer Ali and *Baboo Mohesh Chunder Chowdhry* for Appellant.

rs. Paul, R. E. Twidale, and *M. L. ndel* and *Moonshee Mahomed Yusuf* for spondents.

re a minor son sued through his mother to re-possession of ancestral property, which had been execution of a decree obtained against his on a bond-debt, and it was contended, *firstly,* e purchaser was bound to satisfy himself that the under which the property was sold had been given against the judgment-debtor, and, *secondt,* in consequence of the high rate of interest d on the amount of the debt, the decree on the f it gave notice that it could not be enforced the Mitakshara Law, HELD that the Privy il Ruling requiring a judgment creditor only to himself that a decree had been "properly" did not require him to go beyond the decree though in this case all the evidence showed that t had not been an immoral one; and that even a high rate of interest, such as 50 per cent., was not in itself a ground for invalidating a bond, or for questioning the *bona fides* of an auction-purchaser.

Some restrictions of the Hindoo Law against usury are not enforced in the Courts.

THE plaintiff in this suit is the minor son of one Gobind Doyal Singh. He sues through his mother and guardian to recover possession of a share in certain property which he says was his ancestral property, and to which, under the Mitakshara Law by which his family is governed, he says he was entitled to a share. He says further that his father, having contracted debts extravagantly, and hypothecated ancestral property without any legal necessity, executed a bond, dated the 10th of July 1864, for a sum of Rs. 2,800 in favour of Demgu Mal and Sheo Lall Marwari, by which bond he mortgaged certain mouzahs not including this particular property; that upon this bond a suit was brought and a decree passed; and that the decree-holder under that decree sold this property, and so it passed into the possession of the present defendants, and he seeks to have it declared that, notwithstanding that sale, he is still entitled to recover possession of the property.

The defendants reply that the property was purchased by them in execution of the decree, as the plaintiff alleges, and they say that the property in suit was sold in respect of a sum borrowed by the plaintiff's father, together with another sum of Rs. 3,000, with which money the plaintiff's father purchased the share of Roghubar Dyal Singh, another member of the family, in Mouzah Hossainipur. They, therefore, contend that the loan on which this decree was obtained cannot now in any way be impeached by the son.

The Subordinate Judge took evidence in the case, but eventually, without in any way going into the evidence, held, upon the strength of a decision of the Privy Council reported in 22 W. R., p. 56, that the decree under which the defendant purchased this

property was conclusive in the matter, and that the defendant was not in any way bound to inquire further when this decree was existing.

Against this judgment the plaintiff appeals, and he contends in the *first* place that the Privy Council case relied on does not make the decree conclusive in the way the Subordinate Judge has held it to be. *Secondly*, he contends that, upon the evidence he has made out his case that this was a debt for which his interest in the property could not in any way be made liable. And, *thirdly*, he contends that, under the terms of the decree itself, the property which should have been first sold in satisfaction of the decree was the property which had been mortgaged, and that, therefore, applying the Privy Council decision in all its strictness, the purchaser had notice upon the face of the decree that this property could not be sold.

Now, with regard to the first point, we think that the decision of the Subordinate Judge is right. The case that we have to deal with here is for all material purposes precisely the same as that which was dealt with by the Privy Council in what is called the "second appeal" in the case referred to, the appeal of Muddun Mohun Thakoor, whose position was precisely that of the present defendants. The Privy Council say, speaking of the purchaser in that case: "He found that a suit had been brought against the two fathers; that a Court of Justice had given a decree against them in favour of a creditor; that the Court had given an order for this particular property to be put up for sale under the execution, and, therefore, it appears to their Lordships that he was perfectly justified, within the principle of the case which has already been referred to in 6 Moore's Indian Appeal Cases, in purchasing the property and paying the purchase-money *bonâ fide* for the purchase of the estate."

Here also there had been a decree of a Court of Justice against the father for money, and an order of the Court that property should be put up for sale.

Then their Lordships quote a well-kn passage from 6 Moore, and then they as follows:—

"The same rule has been applied in "case of a purchaser of joint ance "property. A purchaser under an execu "is surely not bound to go back beyond "decree to ascertain whether the Court "right in giving the decree, or, having g "it, in putting up the property for "under an execution upon it. It has also "been shown that, if the decree was a pro "one, the interest of the sons as well as "interest of the fathers in the prop "although it was ancestral, were liable "the payment of the father's debts. "purchaser under that execution, it app "to their Lordships, was not bound to "further back than to see that there wa "decree against those two gentlemen; "the property was property liable to sa "the decree if the decree had been gi "properly against them."

Now it is contended upon those last wo that the intention of the Privy Council that a purchaser at an execution-sale sho not only see that there was a decree, but a decree had been rightly given against judgment-debtor. That would be rea unsaying all that the Privy Council had j before said upon the matter. What we thi the Privy Council mean by those words that a party is not bound to look beyond decree to see that that was a right decre for they had said already just the contra that he was not bound to do, but he w bound to look to the decree to see that i point of form it was a proper decree. Then that being so, no objection can be taken in point of form to this decree except the one which was taken by Baboo Mohesh Chunder Chowdhry with which we have to deal now,

y contends that even giving the Privy cil decision that interpretation, that the aser was not bound in any way to go d the decree to see what occurred prior to, still he was bound to look to the e itself, and as it stands, there was notice n on the face of the decree that this debt which, under the Mitakshara Law, on was not liable to discharge, and for eason, because it appears upon the face e decree that the interest which was ed upon this bond amounts to some- e about Rs. 1,600 for a period less than r in respect of a principal of Rs. 2,800, g a rate of interest somewhere over 50 cent.

t, even assuming that the Hindoo Law ins a prohibition against the taking of est at so high a rate, and that by the Hindoo interest at that rate could not under circumstances be allowed, still we think that is not a circumstance which, within principles laid down by the Privy Council e case quoted above, can be treated as ing that this was a decree for a debt h the son was not bound to discharge. that purpose we must look into what ases under the Mitakshara Law are, in h he is not bound to discharge the er's debt. That is expressed by the y Council in these words :—

It is necessary, therefore, to see what was e nature of the debt for the payment of ich it was necessary to raise money by e sale of the property in question." , all we know, and all we can know, is t appears on the face of the decree itself. ir Lordships go on to say: "If the ebt of the father had been contracted for n immoral purpose, the son might not be nder any pious obligation to pay it, and he ight possibly object to those estates hich have come to the father as ancestral roperty being made liable to the debt. hat was not the case here. It was not "shown that the bond upon which the decree "was obtained was given for an immoral "purpose, it was a bond given apparently "for an advance of money, upon which an "action was brought."

Can we say here upon the face of the decree that, so far as it orders interest to be paid, it is a decree for an immoral purpose? One might almost say that such a question answers itself. It may be that under Hindoo Law there were some restrictions against the allowance of interest, but it is well known that those restrictions are no longer enforced by our Courts. There is no ground whatever for saying that what our Courts allow in the shape of interest is money directed to be paid for immoral purposes. Therefore upon that ground it appears to us impossible to say that on the face of the decree it was one for a debt which the son was not bound to discharge.

This view of the case renders it unnecessary to consider the facts of this case, but, having heard the case very ably argued on behalf of the appellant, we think, even upon the facts of the case, that this was a debt which the son was bound to discharge.

The evidence of the witnesses for the plaintiff contains very general allegations of debauchery and other immoral conduct against the father. It is almost admitted that we should not act upon those charges which are made almost in every case like the present; and what we have really to determine in this case is, whether this money, which undoubtedly was raised, was applied in making a present to a woman of bad character, or whether, as the defendants state in their written statement, it was applied for the purpose of saving the property of another member of the family for the benefit of the family.

Now, looking to the evidence on that point, we have no hesitation in saying that the defendants have made out their case. It is

not denied that there was a kobala transferring the property of Roghubur Dyal Singh to the father of the plaintiff, Gobind Doyal Singh. But it is said that that was a mere *benamee* transaction for the purpose of protecting Roghubur Dyal's property from his creditors, he being also in debt. On the face of it that is inconsistent with the rest of the case, which was that Gobind Doyal himself was making away with his own property as fast as he could, and we think that the evidence in support of this being a real transaction is satisfactory, and such as we ought to receive. The first witness who was called appears to be a very respectable witness. He calls himself a Tupadar. He says he transacted business with Gobind Doyal Singh. He gives particulars of this transaction, and says he was present when it was entered into. That is fully corroborated by the deposition of Harman Ray. He mentions circumstances which could be very easily contradicted if untrue, and which strongly corroborate the story of the defendants. He says that in point of fact the kobala was executed before the bond upon which this decree was afterwards obtained, but that the kobala and the bond were registered at the same time. That we think very strongly suggests some connection between these transactions. Therefore, upon the evidence, if one was at liberty to go into the evidence, we should think that the debt was one which, under the Mitakshara Law, the son was bound to discharge.

Then the other question remains, namely, as to the form of the decree. Now, we had the decree read to us, and we consider this not to be such a decree as we know is sometimes made, namely, a decree restricting the parties in the first instance to the sale of the mortgaged property; but it is a decree against the mortgagor generally, coupled with what is called a declaration of the lien, a declaration which it is exceedingly common to insert decrees against mortgagors upon a bond of this nature.

The bond also, as has been pointed out by Mr. Advocate-General, was not only a bond pledging the property, but a bond which made the party personally liable for the money.

Now, upon a decree of that kind, we have no hesitation in holding that a person entitled in law proceed either against the person or against the mortgaged property specified in the decree. In saying that, we do not at all mean to say that that is a course which in all cases ought to be allowed. There are undoubtedly, cases in which that would operate greatly to the injury of the mortgagor, and we desire to say nothing which would in any way interfere with the discretion of the Court executing the decree to take such precaution as might be necessary against any injury of that kind. But we think that in the present suit no inquiry upon such a subject as that can take place. I have already quoted the passage from the Privy Council judgment which points out the duty of a purchaser at an execution sale in such a case as this. We think that, under the law as there laid down, the purchaser had a right to assume that the property which was sold at this sale was liable to be sold under this decree. And that any question which the judgment-debtor might have raised or did raise upon the order under which the property was brought to sale and disposed of at the time when the sale was ordered to take place. Therefore, whatever may be the judgment-debtor's right under such a decree as this, that question cannot be raised now as against the person who has purchased at a sale under a decree of Court. Therefore that ground also fails.

The result is that the regular appeal must be dismissed with costs.

The 10th June 1876.

Present:

Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

of Action—Amendment of Plaint—Limi-—Particulars of Plaint—Boundaries of tes.

Case No. 308 of 1874.

lar Appeal from a decision passed by Judge of Midnapore, dated the 25th gust 1874.

m Doyal Khan and others (Plaintiffs), *Appellants,*

versus

jah Ojoodhia Ram Khan and others (Defendants), *Respondents.*

Kennedy and *Baboos Umbica Churn se* and *Bhyrub Chunder Banerjee* for ppellants.

rs. Woodroffe, W. C. Bonnerjee, and *R. T. lan* and *Baboo Bhowany Churn Dutt* Respondent, Rajah Ojoodhia Ram Khan.

Advocate-General and *Messrs. Evans d R. T. Allan* and *Baboo Bhowany urn Dutt* for Respondents, Watson d Co.

e plaintiffs having sought to recover possession of which they had been holding under an istemrari osi tenure at a fixed rent up to the year 1837, f which they were dispossessed under circumstances g out of a sale of the parent zemindaree for rs of revenue in that year, the District Court, out precis ly defining the cause of action, found it arose in 1837, and, ruling that the suit was d by limitation, dismissed it.

e circumstances were stated as follow: On the for arrears in 1837, the Government, which had ht in the zemindaree, had given a farming lease to Messrs. Watsons, who, however, though the was never set aside, consented to hold their farm-lease under the zemindar, if he consented to renew n the Government relinquishing its auction-pur-se. On plaintiffs' suing to recover their istemrari rosi right against the zemindar and farmers, it held by the first Court, and re-affirmed by the Privy Council (*Mitter, J.*, finding that the Privy Council had declared Messrs. Watsons' farming lease to be intact against plaintiffs so long as it remained in force; but *Markby, J.*, doubting whether, during the term of that lease, the plaintiffs' mourosi rights were, under the Privy Council Ruling, entirely suspended), that the Watsons were entitled to possession during the survival of their lease. Before expiry of the farming lease, a fraudulent sale, of which plaintiffs were left in ignorance, took the zemindaree, in 1848, into the hands of third parties, the litigation to recover the estate from whose hands, or from those of their mortgagees—litigation carried on alternately by the zemindar and by persons to whom it had been leased or sold for a time, and from whom the zemindar eventually re-purchased it—extended down to July 1871, when the zemindar was put in possession under a decree of the High Court. Plaintiffs contended that they could not have proceeded against the persons who got possession under the fraudulent sale of 1848, because they had been kept in ignorance of it; and that they could not proceed against the zemindar before he was put in possession in 1871.

The main issues now before the Court were (1) whether the cause was barred by limitation; (2) when the cause of action arose; and (3) whether, if the written statement filed in the first Court had left that matter in doubt, the plaint could be amended on the pleadings in appeal.

In regard to the issue of limitation, HELD that the District Court had acted wrongly in dismissing the case as being barred by limitation, since the period from which limitation should run depended on matters which thus far had not been determined in this suit; and that two of the matters which required to be determined, and could only be determined on documents which had not been filed here, were, *firstly*, whether the plaintiffs were right in claiming *under* the Watsons instead of *over* them as mourosi istemrari holders under the zemindar; and, *secondly*, whether the plaintiffs' title was in the nature of a zemindar or reversionary interest, and as such matured on the termination of the farming lease in 1860, from which period, if it were so, the limitation might be held to run.

In regard to the cause of action, HELD that, on the case as put in the pleadings on appeal, the Court could not say that it disclosed no cause of action; but that it was necessary that the suit, which had been improperly dismissed on the plea of limitation, should be properly tried.

In regard to the amendment of the plaint, HELD (following the Court's ruling in Joseph *vs.* Solano and the Privy Council Ruling in Mohamed Zamin Allee Khan *vs.* Mussamut Thakooranee Rutta Koer), that it was always open to the Court to allow a suitor to amend his plaint in appeal: HELD also that the Privy Council Ruling in 11th Moore's Indian Appeals, page 22, which applied to a case in which the Judges had decided

a case upon an assumed set of facts, contrary to those stated in the plaint, and devoid both of allegation and of evidence in support of it, did not apply to an amended plaint amply supported by allegation in the pleadings, and in support of which it was urged that evidence might be adduced. (The District Judge, it will be borne in mind, had received no evidence.) Under s. 141, Code of Civil Procedure, the Court may amend issues at any time before the decision:

HELD also that, where a whole estate bearing a name is sued for, the boundaries need not be given.

Markby, J.—IN this case the plaintiffs sue to recover an istemrari mourosi right and possession of an extensive tract of country in Zillah Midnapore. The property is of very large value, and the appeal has been very fully and ably argued.

It is necessary to state in what shape the appeal comes before us. The plaint is not at all in the form prescribed in Act VIII. of 1859, but, as customary in the mofussil, is a plaint and written statement combined. The plaint was admitted, and the defendants having filed their written statements, the case then came on before the District Judge for settlement of issues. Upon that hearing the District Judge, without taking any evidence, dismissed the suit. Against this decision, the plaintiffs appeal.

One of the questions which was argued before the District Judge and which he decided was, whether the plaint disclosed a cause of action. The District Judge held that it did disclose a cause of action. Against this there is no appeal. The District Judge further held that the cause of action arose in 1837, and that the suit was barred by limitation, and against this the plaintiffs appeal.

I am not quite sure from the judgment of the District Judge what he considered the plaintiffs' cause of action to be. There can be no doubt that the plaint does disclose one cause of action, namely, that the person through whom the plaintiffs claim was, in the year 1837 or thereabouts, dispossessed by the auction-purchaser under an illegal sale for arrears of Government revenue, which was afterwards set aside. But that this was the sole view put forward in the C below is clear from the 3rd and the issues.

It therefore becomes necessary to co what the plaintiffs' cause of action is, Mr. Kennedy on behalf of the plaintiffs states his case as follows; It is nece to set it out in full as the terms of it no doubt, form the subject of much dis sion hereafter.

Chooney Lall Khan, the father of Sreem Lall Khan, and the grandfather of what called the Khan plaintiffs, is the person f whom all the plaintiffs derive their either by descent or purchase. Chooney had a mourosi istemrari pottah of the to which this suit relates at a fixed rent Rs. 2,250 per annum, which tenure had b granted by the zemindar, and under which was in possession in the year 1837.

In the year 1837 the zemindari was up to sale for arrears of Government reve and purchased by Government as the high bidder for one rupee. The Government granted to certain persons, who have b called the Watsons, an ijara-pottah of whole zemindari for twenty years. Ultimat although the sale *was never set aside*, Government, by an agreement betw itself, the Rajah and the Watsons, re quished its title under the auction-purcha and made over the zemindari to the Raj with its previous encumbrances and sett ments; it being at the same time agreed t the Rajah would confirm the ijara which Government had previously granted to t Watsons, so far as it related to that part of t zemindari known as the jungle mehals, b not as to the rest of the zemindari. Thereupo the Watsons, on the 7th June 1842, obtained from the Rajah an ijara-pottah for twenty years of the jungle mehals, and by this means kept Sreemunto Lall Khan, the son of Chooney Lall Khan, out of possession of his

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mourosi tenure which was situate within the jungle mehals. Sreemunto Lall Khan then instituted a suit in the Court of the Principal Sudder Ameen, by whom it was dismissed. Upon appeal the Sudder Dewany Adawlut reversed the decision of the Principal Sudder Ameen, and, on the 13th of July 1848, gave to Sreemunto Lall Khan a decree, under which he took possession. This decree, however, was in its turn reversed by the Privy Council on the 3rd February 1854, and that of the Principal Sudder Ameen restored, in consequence of which the Watsons re-entered into possession, ousting Sreemunto Lall Khan. Sreemunto Lall Khan died in 1858. It is the result of the Principal Sudder Ameen's decision that Sreemunto Lall Khan was declared to have no rights in the property during the continuance of the ijara of the Watsons, his rights being extinguished until the expiration of that term; and when that term expired, that is to say, on the 22nd July 1860, the sons of Sreemunto Lall Khan would have instituted a suit; but in the meantime Mr. Abbott had taken possession of the zemindari by virtue of his purchase of the title of the mortgagee under the mortgage executed by the Rajah-defendant in favour of Ashutosh Deb and others, and he (Mr. Abbott), having privately arranged to sell the zemindari to Mr. McArthur, and to secure to the latter such a title as would enable him to avoid all the encumbrances and settlements which had been previously made by the former zemindar, colluded with the latter with a view to deprive the plaintiffs and the Rajah-defendant of their rights and interests by means of fraud and artifice, and defaulted to pay the Government revenue, and fraudulently and illegally brought the zemindari to sale on the 29th April 1848, when Mr. McArthur purchased it and took possession of the whole of the zemindari. As Sreemunto Lall Khan and the plaintiffs were ignorant of the above acts of collusion and fraud by which the revenue-sale was brought about, the plaintiffs were unable to bring a suit for annulment of the above fraudulent auction-sale; and, as the zemindari was not in the Rajah-defendant's possession, the plaintiffs could not bring a suit for recovery of possession on the determination of Messrs. Watson and Co.'s lease. On the 23rd April 1861, the Khan-plaintiffs sold to Sreenarain Bysack a moiety of their interest in the tenure, and let him the other moiety. This person brought a suit in the Supreme Court for ejectment in respect of this property which was afterwards withdrawn. Subsequently, that is to say, on the 29th July 1871, Sreenarain Bysack re-conveyed his entire interest to the Khan-plaintiffs, who have since conveyed portions of that interest to the other plaintiffs. Rajah Ojoodhia Ram Khan, having become aware of the fraudulent character of the auction-sale for arrears of revenue, on the 29th of April 1848, instituted a suit in the District Court of Midnapore against Siddhee Nuzur Ally and others, being the parties then in possession, for recovery of the zemindari, and ultimately obtained a decree for possession and mesne-profits on the 29th September 1866, which decree was upheld by the High Court on the 4th September 1867. An appeal was preferred to the Privy Council, but it was not prosecuted; and in execution of this decree the Rajah finally got into possession of the zemindari on the 11th July 1871.

This is the case of the plaintiffs. Besides stating the above facts, the plaintiffs expressly admit that, by the proceedings which took place before the Collector consequent upon the sale for arrears of revenue of 1837, the mourosi tenure which was then vested in Sreemunto Lall Khan was put an end to. But they contend that, in consequence of the arrangement between the Rajah, the Government, and the Watsons, Sreemunto Lall Khan

had a right as against the Rajah and all persons claiming under him, other than the purchasers for valuable consideration without notice, to be restored to his tenure. This right, they contend, the Principal Sudder Ameen by the decision of July 1848 declared to be suspended until the expiration of the twenty years' ijara granted to the Watsons. They further say that this right was a personal equity against the Rajah, which could not be enforced when the ijara expired against the mortgagees of the Rajah, because they had no notice of it. They say, moreover, that this equity was destroyed by the sale for arrears of revenue in 1848, but that it arose again when Ojoodhia Ram recovered possession of the estate under the decree of the District Judge of Midnapore affirmed by the High Court as above mentioned.

It was very strenuously argued on the part of the respondents, especially by the learned Counsel who appeared for the Rajah, that the plaintiffs could not be allowed to put their case in this way; and as it was alleged that to allow them to do this would not only be contrary to law, but would also be a great hardship to the defendants, I think it right to state how, in my opinion, the matter actually stands.

The suit, it must be remembered, was (as already stated) disposed of by the Court below at the first hearing upon the settlement of issues. Not a tittle of evidence has yet been taken, and I neither affirm nor deny the truth or otherwise of any single one of the facts above stated. Some of them, I believe, are not disputed, but many are so. I only state the case as it has been placed before us by the Counsel for the appellants. Moreover, it must be remembered that, by express provision of the Code of Civil Procedure (section 135), the Court may frame the issues from the allegation of facts which it collects from the oral expression of the parties or their pleaders, notwithstanding any difference between any allegation of f and the allegation of fact contained in written statement (if any) tendered by parties or their pleaders. The allegatio facts set out by us above, as relied o Mr. Kennedy, do not, however, mate differ from the allegations of fact set o the plaint, except in this—that, where the plaint there were allegations that the revenue sales were set aside, those gations are now withdrawn, and it is ad ted that they were neither of them set a As before pointed out, it is clear from 3rd and 11th issues that something was upon this point in the Court below, and very doubtful whether these allegations not then withdrawn, for it is to be obse that, whilst, in the District Judge's state of the facts of the case in his judgment reference is made to either of the sales b set aside, and whilst the 11th issue r the question whether the tenure could revived *without* the sale of 1837 being aside, the plaintiffs did not ask for any i upon the question whether or no that been done. But, if there were any d about this, and as to the application of tion 139 when the case is in the Cour appeal, there are still the provisions of tion 141 under which "at any time be the decision of the case the Court amend the issues or frame additional is on such terms as to it may seem fit; and such amendments as may be necessary the purpose of determining the real questi or controversy between the parties shall so made." The mode in which the case now put on the part of the plaintiffs ma render necessary the amending of the issue or the framing of additional issues, and th can be done at the request of either party either by this Court or the Court below, should the case eventually go down for trial.

There is, moreover, in my opinion, ample authority in the decisions of this Court and

of the Privy Council to justify the course which we have taken. In Joseph *vs.* Solano* (9 B. L. R. 453), Sir Richard Couch thus states what he considered the Privy Council to have done in the case of Mahomed Zahoor Ali Khan *vs.* Mussamut Thakooranee Rutta Koer, reported in 11 Moore's Indian Appeals 468: "The Judicial Committee having held that, on the face of the plaint, no relevant case was made against the defendants; but that in a suit properly framed, if he proved his case, he would be entitled to a decree against one, and considering that a new suit would probably be met by a plea of the Act of Limitations, allowed the appellant to amend his plaint so as to make it a plaint against the defendant alone for the recovery of money due on a bond. They considered that the liability on the bond might be tried on the issues already settled, but they would not intimate any opinion upon them and the evidence, and remanded the suit for re-trial."

In the case of Joseph *vs.* Solano itself, the plaintiffs sued upon a promissory note; the Court of first instance held that one or two small items in the account forming the consideration for this note were illegal, and on that ground dismissed the suit. Sir Richard Couch agreed in this opinion and considered that, with regard to this note, the plaintiff's suit had failed, and ought to be dismissed, but he allowed the plaint to be amended, and an issue to be framed in order to inquire what amount was due to the plaintiffs in respect of the consideration of the note. That is going far beyond what we propose to do here.

It is said that the decision of the Privy Council in 11th Moore's Indian Appeals, p 22, shows that we ought not to allow the plaintiffs to set up the case upon which they now seek to rely. In my opinion that case has no application whatever to the present. The observations of the Privy Council in that case were based upon the position of this Court when hearing a special appeal, at which stage all consideration of the facts is excluded; and they point out that the learned Judges, whose judgment was under appeal, after all the evidence had been taken and the facts conclusively found, had decided the case upon an assumed state of facts contrary to those stated in the plaint, and devoid not only of allegation, but also of evidence in support of it. That is not what is going to be done here. It is true that the Privy Council say "they wish to take that opportunity of putting out the absolute necessity that the determination in a cause should be founded upon a case either to be found in the pleadings, or involved in, or consistent with, the case they thereby made," and this has been supposed to prohibit all departure whatsoever from the written allegations of the parties. But we must read this decision of the Privy Council with the other decision already referred to, and which was decided only a few months afterwards. The Privy Council must also have been aware that there were no regular pleadings in this country, and they must also have been aware of the provisions of the Code of Civil Procedure to which I have referred, and I have no doubt, therefore, that by the word "pleadings" in this passage was meant such allegations as the parties put forward at the proper time and in the proper manner; and that the practice that the Privy Council wish to enforce is not an absolutely rigid adherence to the plaint and written statements (which the Code declares not to be necessary), but that care should be taken to raise properly on the issues and at the proper time the questions to be tried, so as to give the parties an opportunity of producing their evidence and being heard upon the points upon which the decision of the case ultimately turns. I think, therefore, that there is no objection

* 18 W. R. 424.

to the plaintiffs putting their case as they now seek to put it.

It was further objected that no such right to be restored to the tenure as the plaintiffs now put forward could be claimed; in other words, that the case of the plaintiffs, as now put, did not disclose any cause of action. I do not, however, think that we could dismiss the suit on this ground. Whether any such right as the plaintiffs now claim can be established by law will be determined hereafter when the facts are fully ascertained.

Another objection raised by the respondents to the mode in which the plaintiffs case is now put was, that, if the plaintiffs ever had any such right as that which they now claim, it had been abandoned by the conduct of Sreemunto Lall Khan, particularly by his conduct with reference to the litigation of 1844 in which he was plaintiff. But this, I think, cannot be determined now. If the suit be tried, this may form one of the issues.

Then we come to the question whether the claim of the plaintiffs is on the face of it barred by limitation, and, of course, in determining this point at this stage of the proceedings we must take the case as the plaintiffs choose to put it, provided that they keep within the allegations made.

Now, from the mode in which the arrangement between the Rajah, the Government, and the Watsons is stated in the first part of the plaint, I should certainly have thought that any right Sreemunto Khan obtained thereby might have been asserted at once. He could apparently have required the Rajah to recognize his tenure at once. This the Rajah might have done by allowing Sreemunto Khan to stand between himself and the Watsons in respect of the lands covered by his tenure, which would, in no way, have interfered with their ijara, and would have put him at once in possession of a large income. To this income, if th be anything in his present case at all would appear to me that he was t entitled. Instead, however, of asserting t right, Sreemunto Khan chose to join w the Rajah in trying to get rid of t Watsons altogether, by asserting that he h his tenure *under* the Watsons instead of a them, a right which he failed to establi That, however, is not the view which t plaintiffs now put forward as to the ef of the transactions between the Rajah, t Watsons, and the Government. They c tend that, during the ijara of the Watso Sreemunto Khan's rights as mourosi were entirely suspended, and they go t far as to assert that this point has b finally determined by the decision of t Principal Sudder Ameen. I do not ass to this latter contention. I do not think t this view, which certainly seems to have be in the mind of the Principal Sudder Ame was affirmed by the Privy Council. Nor c I help considering it as something ext ordinary that the Government should h done this apparent injustice to Sreemu Khan. I do not see why an arrangem should have been made which benefited t Rajah at his expense, when the gene desire was to protect the claimants on t zemindari. But I must admit that we a not now in a condition to decide this que tion, because the documents which show th exact nature of the transaction are no before us; they were apparently filed wi the plaint, but were removed from the reco by order of the District Judge and hav not been restored, and I cannot, therefore, undertake to say that the effect of the transaction cannot have been such as the plaintiffs alleged and as the Principal Sudder Ameen appears to have thought. I cannot, therefore, say that the right now set up was capable of being asserted as soon as the Rajah was restored to his zemindari, and

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this ground it is barred by limi-

in, it is contended for the defendants Sreemunto Khan's interest was sus-d during the ijara of the Watsons, then in the nature of a remainder ersion which fell into possession in and that the suit was, therefore, barred twelve years of that date under the ions of clause 141 of Schedule 2 ct XI. of 1871. But Mr. Kennedy this by the assertion that the right of e Sreemunto Khan or his representatives nerely a personal equity as against the and not anything in the shape of a inder or a reversionary right to the itself. Here, again, without the docu-s before us, it is impossible to say what the nature of the plaintiffs' right, and e plaintiffs choose to put their case in way, I do not think we can then apply provision of the Statute. As far as n see if the plaintiffs succeeded in lishing their case in the way in which now put it, no question upon the e of Limitation really arises at all. base their present right upon the last very of the estate by the Rajah Ajoo-Ram, by the decree of the District t of Midnapore affirmed by this Court, say that their cause of action arose when ecovered actual possession of the estate. really, therefore, at the present stage e inquiry, rather a question whether plaintiffs disclose a cause of action, whether the suit is barred by the ute of Limitation. I have already said I am not prepared to say that the case the plaintiffs, as now put, discloses no se of action. I think sufficient is stated render it necessary that the suit should e tried.

In this view it is, of course, unnecessary express any opinion upon the contention the plaintiffs that, even if they could have brought their suit whilst the Rajah was out of possession, they would be protected by the provisions of section 19 of Act IX. of 1871. But as that point has been argued, and may possibly arise again, I may say that, in my opinion, section 19 does not apply to this case, because I do not think the plaintiffs allege that they claim through either Abbott or McArthur by whose fraud they alleged that they were kept in ignorance of their rights.

The lower Court seems also to have proposed to deal with the 11th and 12th issues, and what I understand to be the opinion of the lower Court on these issues is, that the Privy Council had finally decided on the 3rd February 1854, that the mourosee tenure was destroyed by the revenue-sale of 1837, and could not be regained until that sale was set aside by a suit. The Privy Council do, undoubtedly, say in one passage: "All the right of that party (*i.e.*, Sreemunto Khan) was merely to institute a suit for the purpose of setting aside the sale which had been made to Government and the lease which had been granted under that sale." But the view of the case now put forward was certainly not then suggested to the Privy Council and was not adjudicated on. The objection, if it is worth anything, falls rather under section 7 of the Procedure Code, than under section 2, but I do not think it falls under either. For if the view of the transaction between the Government, the Watsons and the Rajah, which the plaintiffs now contend for, be correct, their present cause of action was not in existence at all at that time.

Lastly, the lower Court held that the plaint ought to be returned upon the ground that it is deficient in the particulars required by section 26 of Act VIII. of 1859. That section requires that, "when the claim is for land or for any interest in land, the

nature of the tenure or interest must be specified; and if the claim be for land forming part of a village or other known division, or for a house, garden, or the like, its situation shall be described by the setting forth of boundaries, or in such other manner as may suffice for its identification" (clause 5). Taking this with the form given in clause 4, it is clear that, when a whole estate bearing a name is sued for, the boundaries need not be given. The plaintiffs here sued to recover two estates, "Mouzah Barrooah, formerly included in Hudah Tomapara, and now included in the map of Hudah Satpatti Jungle mehal," and "Jungle Mehal Hudah Satpatti, &c., composed of the turrufs therein comprised, *viz.*, Turruf Roygurh, Turruf Gurwul, Turruf Salboni, and Turruf Nij Satpatti, and the mouzahs situated within them." This is the correct translation of the plaint given to us.

My learned colleague suggests that the plaintiffs should make their plaint more precise by filing their survey-maps of the mouzahs which they claim, and I concur in that view. The plaintiffs, therefore, will be ordered to do this.

In my opinion the decree of the lower Court dismissing the suit should be set aside, and the suit remanded to the District Judge of Midnapore for trial. The costs hitherto incurred will abide the result.

Mitter, J.—I am also of the opinion that the judgment of the lower Court cannot stand. But I desire to record the grounds upon which I think that at this stage of the case the lower Court was not right in dismissing the suit as barred by limitation. Upon the other objections raised before us on behalf of the respondent, I entirely concur in the reasons given by my learned colleague in overruling them.

The plaintiff puts his cause of action as having arisen when the defendant's possession was restored. This is admittedly within the time allowed by the Law of Li tion for bringing a suit of this n At this stage we cannot say that, acco to the case which has been put befo the ground upon which the plaintiff's has been made to rest, does not consti valid cause of action. The contenti the learned Counsel for the plaintiff been that, according to the arrangement der which the zemindary was restore the defendant, the plaintiff acquired an table right which would entitle hi demand possession of his mokurruri pro from the Rajah, whenever he happen be in a position to make good that It has been further said that this personal equity against the Rajah, enfo able against him or persons deriving title through him, with notice of the e ence of this equity. It could not enforced against the Rajah's mortga because they had no notice of this eq and the time for enforcing it against Rajah arrived only when his possession the zemindary was established. Wit allowing the plaintiffs to adduce their dence, we cannot say that this case, put before us, cannot succeed, and must therefore, dismissed at this stage. Agai the facts upon which the plaintiff's case put before us is based, be established, it wo be a question requiring serious attention wh ther the plaintiff's claim would not be sa from the operation of the Law of Limitati under the provisions of section 29 of A I. of 1845. But it is not necessary to co sider this question now, because, upon th other contention raised by the learned Counsel for the plaintiff, I am not prepared to say, at this stage, that the cause of action disclosed is not such a valid cause of action that the plaintiff can successfully maintain this suit upon it.

But it has been said that, upon the statements of the plaintiff's case, it is evident

he cause of action for the establish- of the plaintiff's title accrued at a earlier date, and, counting from it, the t suit has not been brought within me allowed by the Law of Limitation. contention of the learned Counsel for spondent upon this point is two-fold: that immediately on the restoration e zemindary to the defendant in the 1842, plaintiff's cause of action arose; *econdly*, if it did not arise then, at any t arose in the year 1860, when the of the ijara to Messrs. Watson & Co. ed.

he year 1842, when the zemindary was ed, it has now been conclusively estab- that the plaintiffs were not entitled to ssion. In a suit instituted by the father e plaintiff against Messrs. Watson & which went up to the Judicial Com- e of the Privy Council, it was held that emindary was restored to the defend- preserving intact the rights which rs. Watson & Co. acquired under the existing Revenue Sale Law. But it een said that the father of the plaintiffs assert his right immediately by asking ajah to recognize his tenure by allowing to stand between him (the Rajah) and jaradars, Messrs. Watson & Co. This ould not do, because the ijara-lease ded over the whole of the jungle l, while the plaintiff's tenure comprises a portion of it. He could only ask the h to account to him for his share of the s derivable from the ijaradar, propor- te to the interest he had in the jungle l. But if the Rajah failed to account to in any particular year, for his share of profits, that gave rise to a cause of n for suing the Rajah to recover his of the profits, a cause of action very ent from the one upon which the present has been brought. I do not mean y that under no circumstances could non-payment by the Rajah to the plaintiff's father of his share of the profits give rise to a cause of action upon which he would be bound to sue within the time allowed by law to enforce the right alleged to have been secured to him by the compromise between Government and the defendants. Facts might be established which would go to show that such a cause of action did accrue. But there is nothing in the statement of the plaintiff's case, as it was put before the lower Court or before us, from which we can say that this was the case. Furthermore, it appears to me that it has not been admitted by the plaintiffs that the defendants did not account to them for their share of the profits during the continuance of Watson's ijara lease.

Then as regards the other contention. The learned Counsel for the plaintiffs answers it by asserting that their right is of such a nature that it could not be enforced against the Rajah's mortgagees, who had no notice of it. Without an inquiry into the nature of this right, and without an inquiry into the question whether the mortgagees had or had not such notice, we cannot say that this is not a sufficient answer. Further, as I have already observed before, it is a question which would require serious consideration in this case, whether the provisions of section 29 of Act I. of 1845 would not enure to the benefit of the plaintiffs. Although it has been declared by a competent Court that the revenue-sale of the zemindary in 1848 is to be treated as a mere private sale between the defendants on the one hand and the auction-purchaser and the subsequent transferees on the other hand, it by no means follows that, after the zemindary came back to the defaulting proprietor, the under-tenants would not be entitled to rely upon section 219 of the Sale Law of 1845 for being restored to their tenures.

For these reasons I do not think that, at

this stage of the case, without a trial of it, the plaintiffs' case should be dismissed as barred by limitation.

The 15th June 1876.

Present :

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Limitation—Adverse Possession — Foreclosure of Mortgage.

Case No. 912 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 4th May 1871, affirming a decision of the Subordinate Judge of that District, dated the 26th May 1870.

Kanti Chunder Mookerjee (Defendant), *Appellant,*

versus

Bamun Doss Mookerjee (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee, Ashoolosh Dhur, and *Jadub Chunder Seal* for Appellant.

Mr. J. S. Rochfort and *Baboo Sreenath Doss* for Respondent.

Where a plaintiff, who had acquired the right of a mortgagee in a putnee turruf, had foreclosed the mortgage under a decree of the Supreme Court in 1852, but had omitted to take out execution until 1869 when he first sought to obtain possession, and defendant put in a claim to the turruf on the ground that his predecessor in title had, as dur-putneedar, paid in the revenue to save the putnee, and had taken possession of the estate under s. 13, Regulation VIII. of 1819, and the lower Courts found that plaintiff was entitled to recover possession, because the dur-putneedar had recovered the amount of his deposit in the intervening years, HELD by the High Court that the plaintiff's claim was barred by limitation :

HELD, also, that the dur-putneedar's occupation of the putnee after his lien on it had expired was an adverse possession, which the plaintiffs were bound to re[illegible] soon as they became aware of it; and that this [illegible]tion was not loosened by the fact that the mortga[illegible] on the expiry of their lien, were bound to find o[illegible] owners and deliver up the estate to them.

Jackson, J.—THE facts of this c[illegible] which are a little complicated, are [illegible] stated in the judgment of Mr. Hersc[illegible] the Officiating Judge of Nuddea. T[illegible] plaintiff, it seems, is one of several pe[illegible] who, having acquired the rights of [illegible] mortgagee in a share of the putnee T[illegible] Santipore, foreclosed the mortgage und[illegible] decree of the late Supreme Court of [illegible] year 1852. The full share so forecl[illegible] was 3 annas 11 gundas, and the pre[illegible] suit relates only to a portion of that sh[illegible] *viz.*, 11 gundas 13 kags 16 teeles. [illegible] persons whose rights were thus foreclo[illegible] were one Raj Chunder or Raj Mohun a[illegible] Hur Mohun. It seems that, at the time [illegible] the foreclosure, the putnee was in the pos[illegible] sion of Raj Kisto Roy, who admittedly [illegible] no other than an ostensible holder; a[illegible] under these circumstances, the putnee ha[illegible] fallen into arrears, this Raj Kisto, se[illegible] as a dur-putneedar, was allowed to [illegible] in the amount of revenue in default, a[illegible] under the provisions of section 13 of R[illegible] gulation VIII. of 1819, was allowed [illegible] get possession of the mehal, with a [illegible] to the satisfaction of the lien which he h[illegible] acquired by this payment. The parti[illegible] who had foreclosed, finding this to be th[illegible] state of things, made no attempt to obtai[illegible] possession, and never executed the decre[illegible] which they had got in the Supreme Cou[illegible] and it was not until the commencement o[illegible] the suit out of which this special appeal arises—apparently some time in 1869—that any attempt was made to enforce the rights acquired under that decree. Meanwhile one Omesh Chunder Roy is said to have purchased the rights of Raj Kisto, whatever they were. He died and was succeeded by his widow Gyatri, who, in

turn, is represented by other parties, defendants in the cause. The Subordinate Judge overruled the various pleas in defence, and gave the plaintiff a decree, finding on the evidence that the amount deposited by the dur-putneedar to save the estate had been realized by the year 1265, and that consequently the putneedar was entitled to possession. This decision was upheld in an elaborate judgment of the District Judge in appeal. The main question which we had to consider in special appeal was whether, under the circumstances, the plaintiff's suit was not barred. Now, as between the plaintiff and the original mortgagors, Raj Mohun and Hur Mohun, there can be no doubt that he would be barred, because the time within which he could have executed the decree of the Supreme Court has long since expired; but it is alleged that those persons had long ceased to hold any possession or to assert any rights which they had, and that there is no question between them and the plaintiff; and as to those who represent Omesh Chunder and his widow, Gyatri Dassee, it is contended that, as the owners could not seek to recover possession, which indeed the Collector had expressly interfered to protect, without first paying off the amount paid by Raj Kisto, the plaintiff was not called upon to take any steps until it could have been ascertained that the deposit had been satisfied out of the rents and profits. Now, it appears to us clear that Raj Mohun and Hur Mohun or any persons claiming under them might, by reason of the plaintiff having omitted to take out execution of the decree of 1852, successfully resist the assertion of any right accruing under that decree, execution being completely barred. The persons in possession, no doubt, hold upon a different ground, *viz.*, as representing a title derived from Raj Kisto or Omesh Chunder Roy which appears to be the same thing, and it is said that, inasmuch as those persons were clearly entitled to retain possession down to the year 1265, the plaintiff had no cause of action until that time, and the Judge observes that those persons being regarded in the light of mortgagees, or in a sense trustees for the owners, were bound, as soon as the lien was satisfied, to seek out the owners and deliver over possession to them. But it is clear from the statement of facts in the plaint and from the circumstances of the case that this plaintiff and the other persons interested with him knew, and have known all along, that this alleged deposit by the dur-putneedar was a mere sham, and was merely a device to preserve the putnee in the hands of Omesh Chunder Roy. That being so, the possession so held and kept was undoubtedly an adverse possession to the plaintiff, which of course that of the mortgagee would not have been. The Judge considers that the circumstances do not amount to a fraud, but, as he calls it, only to a "harmless device to save the property from the calamitous effect of some accident." But, whether fraudulent or not, it was not a real deposit, or a case of right accruing under section 13 of Regulation VIII. of 1819. It was an arrangement for the purpose of defeating the rights of other persons, and it was one which the plaintiff was entitled to question and was bound to challenge as soon as it came to his notice. It is not pretended that he had not known the real nature of the transaction until within 12 years before the commencement of the suit. That being so, it appears to us that limitation applies, that the suit is too late, and that the judgments of the Courts below are erroneous and must be reversed with costs.

It may be suspected with reference to the share which is in contest in this suit that the present claim is experimental.

The 17th June 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Decree for Account with Power to Redeem—Double Sale.

Case No. 67 of 1875.

Regular Appeal from a decision passed by the First Subordinate Judge of Zillah 24-Pergunnahs, dated the 29th December 1874.

James Mackillican (Plaintiff), *Appellant,*

versus

Kalee Doss Roy and others (Defendants), *Respondents.*

Messrs. Apcar, W. Jackson, and *Morgan* for Appellant.

Baboos Unnodapershad Banerjee and *Bungshidhur Sen* for Respondents.

Where a plaintiff sued to recover possession of property purchased by him at an execution-sale, and agreed, on his title being contested by persons claiming to have purchased the same property at an earlier execution-sale, to take a decree for an account, with power to the defendants to redeem the property on payment of what was due within a fixed period, he, the plaintiff, being entitled to foreclosure in default, but the Subordinate Judge, after fixing several issues, dismissed the suit on the first one, regarding the identity of the land in suit with that actually purchased by plaintiff, FOUND that there was sufficient evidence of the identity of the land, and HELD that a decree should be given for an account with power to defendants to redeem within six months, plaintiff foreclosing in default:

HELD, also, that, as defendants were not parties to the suit in the High Court for foreclosure of the mortgage on which plaintiff purchased, their rights could not be affected by the decree or by the proceedings in execution:

HELD, also, that the mere fact of the plaintiff's purchase being good did not destroy or extinguish the purchase-rights of the defendants.

THIS was a suit for recovery of possession of properties purchased at a sale held in execution of decree under a mortgage, laid at Rupees 10,125.

The facts of this case are clearly s in the judgment of the Subordinate J and are as follow: The plaintiff purch two pieces of land in village Dakhi within Dehi Punchannogram, measuring pectively about 35 and 40 beeghas, at a in execution held by the Registrar o High Court on the 30th July 1872.

The plaintiff alleged that the said l form holdings Nos. 55 and 56 of the Co tor's register, and that he was opposed the defendant Kalidas Roy and othe taking possession of them on the groun the lands having been previously purch by them (the defendants) at a sale hel the Sheriff of Calcutta in execution of a cree against Sreemuttee Nobinmonee Das Charu Chunder Ghose, and Shirish Chun Ghose, on the 27th March 1865.

The title set forth by the plaintiff is Sreemuttee Nobinmonee Dassee and other two persons named above, to al whom the property originally belonged, mortgaged the same with other lands to Mr. J. J. Shillingford on the 29th A 1864; that the latter sued for foreclosu mortgage in the Original Civil Jurisdicti the High Court, and obtained a decree, the consent of the mortgagors, for the sale the mortgaged premises on the 21st Ma 1866; that afterwards the said Mr. Shilli ford dying, his executors and trustees s his rights and interests in the decree the plaintiff under a deed of assignm dated the 17th November 1871; th thereupon he, the plaintiff, carried on th execution of the original decree, and eve tually procured the sale of the mortgage premises and purchased the disputed land himself for a sum of rupees one thousand.

The plaintiff contended that, as the de fendants' purchase took place subsequent to the date of the mortgage to Mr. Shillingford, their rights cannot prevail over his, he having acquired the rights of the mortgagors

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stood at the time of the mortgage of his purchase in execution of closure-decree.

issues framed by the Subordinate embodied all the objections raised by endants to the plaintiff's claim.

issues were as follow:—

—Whether the plaintiff purchased the comprised in holdings Nos. 55 and execution of the High Court decree, ether the said decree was founded on ge?

—Whether the sale held by the High of lands situate in the 24-Pergunnahs for want of jurisdiction, and can the iff acquire any rights under such a sale?

—When the defendants were not to the suit in the High Court for osure of the mortgage, can their rights cted by the decree passed in it or by the dings held in execution?

—If the plaintiff's purchase is good valid, whether, in consequence of the having been made to satisfy a prior ge-lien, the subsequent purchase-rights defendants have become extinguished stroyed?

Subordinate Judge then commenced ecision by saying that, "if the lands sed by the contending parties are entical, then the defendants cannot be allowed to question the validity of High Court decree or the sale held it, nor can he be allowed to question plaintiff's rights derived under such e." The question regarding the identity e lands arises first in this case. And for the reasons detailed in his judgment, Subordinate Judge found that "the were not identical, and that the plaintiff have purchased some other lands than in holdings Nos. 55 and 56."

e Subordinate Judge, therefore, without idering the merits of the remaining issues this case, dismissed the plaintiff's suit on the ground that the plaintiff had failed to establish his purchase of the holdings 55 and 56.

Against this decision the plaintiffs have appealed, arguing that the lower Court was in error in holding that the identity of the lands was not proved, and that the land claimed by plaintiff as assignee of the mortgage to Shillingford are lands other than those occupied by the defendants. Next, that the Court below should have decided between the rights of the plaintiff as purchaser of the interest and rights of the mortgagee, Shillingford, under the mortgage of 27th April 1864, against the defendants as purchasers of the right, title, and interest of the mortgagor under a sale in execution of decree in suit in which Emile Roberts was plaintiff and Nobinmonee Dassee and others defendants. Further that as the plaintiff offered in the Court below to take a decree for an account with power to the defendants to redeem on payment of what was due within a time to be fixed by the Court, and for foreclosure in default, that the Subordinate Judge was in error in not proceeding to give a decree in terms of the said offer, and that, irrespective of the said offer, the Court having the whole question before it, and the facts justifying such a decree, the Court ought to have made the same.

Now, after perusing the evidence, both oral and documentary, we are of opinion that the grounds of appeal are valid, and that the Subordinate Judge was in error in holding that the plaintiff had failed to prove that the lands are identical. On the contrary, we consider that there is evidence sufficient to show that the lands which were mortgaged to Shillingford, and which plaintiff claims as assignee of the mortgage to Shillingford, are the lands of holdings Nos. 55 and 56 now occupied by the defendants. That the defendants did purchase Nos. 55 and 56, and that they are still in possession, is not disputed;

the only question is whether plaintiff purchased the same property. In deciding this question the lower Court appears to us to have given far from sufficient weight to the evidence of Charu Chunder Ghose, one of the mortgagors; for, if his evidence be believed, the lands are clearly identical. This witness distinctly stated that the lands in dispute were the only lands in Dakhinpara and Ultadanga belonging to him, which were intersected by the Eastern Bengal Railway. He deposes that "the pieces were formerly "one, but became divided by the establish- "ment of the E. B. Railway; no other of "my lands in Dukhindari became so divided "by the said railway. These two pieces "were, as we know, in village Dukhindari. "All my properties have been sold under "decrees of Court, and this amongst the rest. "In Ultadanga and Dakhinpara I had no other "land which *was similarly cut through* by the "railway." Now, the only reasons assigned by the Subordinate Judge for discrediting his evidence is that the witness could not have been at the time of the mortgage more than 24 or 25 years of age, and that it is not likely that he would have any personal knowledge of the lands mortgaged, and that, if he knew at the time that the lands were included in the Collectorate holdings, why did he not mention the holdings in the mortgage-deed. The reason, however, for not mentioning these holdings may very possibly have been that the lands, it was thought, could be more easily identified by the description given of them in the deed, the railway having intersected holding No. 55, and a considerable portion of this holding having been taken up by the railway, it certainly seemed easier to define the lands as divided into two plots—one lying to the east and the other to the west of the railway.

From the register of holdings (see page 13, Appendix 1 of the paper-book) it appears that the area of holding No. 55 was 90 beeghas 19 cottahs 6 chittaks 2 ka and the area of No. 56 was 12 b 12 cottahs 2 chittaks 3 katchas, mak total of 103 beeghas 11 cottahs 8 ch 5 katchas, and, if from this be deduc 28-16-15 taken up by E. B. Railw area remaining is 74-14-13-5, or, in numbers, about 75 beeghas, the area in the deed, and from an examin the copy of the map of sub-division filed in this case, and by observing direction the railway runs through th division, it is seen that the description in the deed of the size of the respective *viz.*, 35 and 40 beeghas, tallies with the the western plot in which is situated the of holding 56 and part of holding being about 35 beeghas, and the eastern in which the remaining portion of No. situated, being about 40 beeghas. The fact, that, after this distance of time, the p iff cannot identify all the boundaries the description given in the plaintiff's deeds, is not of much consequence. A p of the robakari of the Judge of the Pergunnahs, dated 4th July 1865, printed in page 57 of the paper-book, that, even at the time the defendants put in possession, there must have been s confusion in the boundaries, for at th request the boundaries taken down the Nazir's peons were omitted from two sale-certificates, and merely the numb of the division, sub-division, and holdi were put down as descriptive of the la We see no reason for discrediting the evide of Charu Chunder, and at the age of 24 he c tainly was old enough to know his own la Taking all the facts into consideration, w hold that the lower Court was in error i finding that the plaintiff had not proved th identity of the land. We, therefore, reversing the lower Court's judgment, find the first issue in favour of plaintiff, the second issue as to whether the sale was void for want of

on was not pressed. And, as the third and fourth, it is clear that, defendants were not parties to the e High Court for the foreclosure of tgage that their rights cannot be by the decree passed in it by the ngs held in execution; nor does the ct of the plaintiff's purchase being d right destroy or extinguish the ent purchase-rights of the defendants, consider that the most satisfactory on to this suit is that which has been offered by the appellants in rt below. We therefore reverse the f the Subordinate Judge, and direct suit be sent down to the lower with directions that, in accordance plaintiff's offer, an account be taken ve be granted to the defendants to on paying what may be found due, terest at six per cent., within six from the date of the settlement of ts.

plaintiff being entitled to foreclosure lt, each party to defray their own

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The 30th May 1876.

Present:

on'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and W. Ainslie, *Judge*.

edan Law — Inheritance — Saham e)—Management—Adverse Possession mitation—Interest—Mesne-profits.

Case No. 78 of 1875.

ar Appeal from a decision passed by Additional Judge of Tirhoot, dated 19th September 1874.

Abdool Ali (one of the Defendants), *Appellant*,

versus

Mussamut Kulsum (Plaintiff), *Respondent*.

Mr. G. Gregory for Appellant.

Mr. Woodroffe for Respondent.

Where the daughter and heiress of a deceased Mahomedan sued his brother and alleged manager for her *saham* (share) in her father's property, which was held in the name of the said brother and of other persons, and explained that her father had never purchased property in his own name, because he was a sheristadar in the District Court, whereas the brother had no official connection, and had time to look after the property, but the said brother opposed the claim, pleading, *firstly*, that he had purchased most of the property in suit in his own name with his own money; but, *secondly*, that, even if it had been otherwise, his possession of the property and enjoyment of the rents for twelve years, during which he was not shown to have made any payments to plaintiff, would have set a bar to this suit by limitation, HELD, *firstly*, that, if defendant had been acting as manager, as he was found to have been acting in regard to some portions of the property in suit, his holding could not be regarded as an adverse possession, or give rise to any issue in limitation; and, *secondly*, that the lands forming the subject of the suit were of various kinds, and must be dealt with separately as follows:—

1. There were different lands conveyed by one deed to defendant and to other persons in a way in which defendant would not have had them conveyed at purchase had he been the real purchaser; but in which an official like plaintiff's father, purchasing benamee, was likely to have disposed of them. Plaintiff must take a decree for her share in these.

2. There were lands purchased either in the name of plaintiff's deceased brother or jointly in his name and in that of defendant, lands which there was no reason for supposing that defendant would have purchased benamee or jointly with his nephew, if he had provided the money; and for these also plaintiff was entitled to a decree.

3. Plaintiff had no right to certain lands bought in the name of a stranger who appeared and deposed that they had been bought by defendant.

4. There were some lands in respect of which plaintiff relinquished her claims.

5. There were ancestral lands in which defendant had a right to share with plaintiff; and other ancestral lands which plaintiff had parted with to defendant for valuable consideration, and in which no right survives to plaintiff.

6. There were other lands in respect of which defendant demanded only abatement of interest or release from liability for mesne-profits.

The defendant's omission to appear and give evidence in regard to matters which he could best clear up was held to strengthen the presumption against him.

THIS is a suit brought by Mussamut Bibee Kulsum, the younger daughter and one of the heirs of the late Tobaruck Ali, who died on the 7th of March 1867, to recover possession of her 7 saham share of certain property which is detailed in a schedule to the plaint, and which is alleged to have belonged to Tobaruck Ali in his lifetime.

The defendants in the suit were, in the first instance, Mussamut Mahmudunnessa, Tobaruck Ali's widow, Mussamut Noor Jehan, Tobaruck Ali's elder daughter, Mussamut Shurfunnessa, the widow of Shaikh Abdool Aziz, Tobaruck Ali's only son, who died on the 15th July 1872, and Shaikh Abdool Ali, the brother of Tobaruck Ali, and Abdool Ghunni, said to be the servant of Abdool Aziz. Subsequently to the institution of the suit, some additional defendants were allowed to intervene as claiming to be co-heirs of Tobaruck Ali with the plaintiff of the property in dispute, *viz.*, Mussamut Hosaini, who claimed to be the second wife of Tobaruck-Ali, with her minor son, Abdool Guffoor; and Mussamut Batalan, who claimed to be the third wife of Tobaruck Ali, with Abdool Rohman, her son, and Wahideen, her daughter, both minors.

The facts were these: Tobaruck Ali, for many years of his life, was the sheristadar in the offices of the Collector and Judge of Zillah Sarun, Shahabad, Gya, Patna, and Bhaugulpore; and the plaintiff's case was that in that capacity he earned considerable sums of money which he laid out from time to time in the purchase of landed estates; but, inasmuch as it was not expedient for him as a sheristadar to disclose the fact of his acquiring these estates in the neighbourhood, he made his purchases generally in the name of his son Abdool Aziz and others, and through his brother Abdool Ali, with whom he lived in commensality in the same house for many years, if not actually up to the time of his death, that he entrusted the charge and ma ment of this property to his brother received the rents and acted ostensi the owner, and who always lived at while Tobaruck was obliged to be a various places transacting his Court-bu The defendant Abdool Ali, Toba brother, on the other hand, contended th portion of the property (with certain e tions which will be presently menti ever belonged to Tobaruck or to A Aziz, but that it all belonged to himsel had been purchased with his own mon his own benefit; and that, although c portions of it were conveyed to A Aziz, those were merely purchases, Abdool Ali, having no child of his own, made benamee in his nephew's name. moreover, contended that, as he had been in possession for upwards of t years, and it was not shown that he ever paid any portion of the rents and fits of the property in question to T ruck or any other person, the Stat Limitation was a bar to the claim. defendant Shurfunnessa's answer as re portions of the property was, that gundas in Mouzah Salimpur Backerg and the houses upon that land were dowed by Tobaruck Ali for the expe of a mosque which he had built, and the plaintiff had, therefore, no claim to estate. That 7 pie 6 krants less a tion in Mouzah Pukri Barai, and 7 in Mouzah Nursinda, had been inherited Abdool Aziz from his father and held by (Shurfunnessa), as her husband's wi as security for her dower; and one anna Mehal Barhourra had also been acquired Abdool Aziz in his own right, and similarly subject to her lien for dow It was admitted that Mussamut Ma mudunnessa, Mussamut Noor Jehan, a Mussamut Shurfunnessa were rightf

Tobaruck Ali; but the claims of ut Hosaini and Mussamut Bata- their children were disputed by the , on the ground that they were obaruck Ali's wives, and that the were illegitimate. Several wit- were examined on the part of intiff to show that Abdool Ali nly as manager of the property, and obaruck was the real owner, and were examined on the part of the nt to prove that Abdool Ali pur- the estates with his own money, and acted as the actual owner.

learned Judge in the Court below in favour of the plaintiff, on the that nearly all the property in ques- as purchased by, and belonged to, ck Ali, and that Abdool Ali only ed it for his brother; and he further that neither Hosaini nor Batalan he lawful wives of Tobaruck Ali, and either they, nor their children, had laim to the property as his heirs. stly, as to the property claimed by nnessa, the Judge finds that this longed to Tobaruck, and that Shur- a could only claim in right of her d Abdool Aziz to share with the other This decision of the Court below given rise to three appeals—one by ol Ali, the brother of Tobaruck, with we have now to deal; another, 3, by Mussamut Batalan and Mus- t Hosaini and their children; and a No. 87, by Mussamut Shurfunnessa.

is necessary for the purposes of this l to deal with the several properties in e *seriatim*, and it will be convenient to in this respect the course which has taken by the Judge in the Court below to adopt his designative numbers. first was an estate consisting of an a share in a village called Chuck ari. This appears to have been acquired partly under a bill of sale dated the 23rd May 1857, by which a share in a property called Gobindpore was conveyed to Abdool Ali (the brother of Tobaruck), and a 4-anna share in Chuck Bhikari was conveyed to Abdool Aziz and two other persons jointly, one half to the former, and the other half to the two latter. Then it appears that, under an execution-sale, Abdool Aziz purchased other six-anna shares in Chuck Bhikari, being the half of 12 annas covered by the certificate of sale issued in the joint names of himself and Bahadoor Ali and Anwar Ali, the two persons above alluded to, so that eight-annas shares were purchased altogether in his name. The defendant Abdool Ali has called witnesses to show that he was the person who effected both these transactions; that Abdool Aziz was at that time a minor; and that he, Abdool Ali, has, from the time of the acquisition of the property, been the manager, and received the rents and profits of it. His case is that, as he had no child of his own, he purchased that as well as other properties which will be mentioned presently benamee in the name of his nephew. The evidence, however, which he has called upon this point is consistent with the case on both sides. It is asserted by the plaintiff that Tobaruck very seldom acquired property in his own name, for the very good reason that, being the sheristadar successively of several Courts in the neighbourhood, he did not wish it to be known that he was owner of landed estates there, and he therefore deputed his brother, who was living with him and was constantly at home, not only to buy the estates, but to take upon himself the entire management and apparent ownership of them. In this point of view, Abdool Ali, whether he bought for himself or his brother, would of course appear to be the ostensible purchaser. The money would be paid by him, and he would be the only person known in the transaction. But

then it is said on the part of Abdool Ali that, unless it can be shown in some way by positive proof that Tobaruck Ali was the real purchaser, and that he was in the actual possession and receipt of the rents and profits, the property must be considered to belong to the person who paid the purchase-money, and who subsequently was in apparent possession and enjoyment of the estate. We consider, however, that we are bound to look to the conveyances themselves, to consider the probabilities of the case, as well as the evidence; and moreover to see what might have been proved, as well what has been proved, on both sides. Now we find here, in one and the same deed, one property conveyed to Abdool Ali, and another to Abdool Aziz and other persons. It is not proved that these persons were in any way connected with Abdool Ali, and no reason is shown why Abdool Ali should have purchased the estate benamee at all, and still less why he should by the same deed have purchased one property in his own name, and another benamee in that of his nephew and other persons. If Abdool Ali had been really the purchaser of the whole, he surely would either have purchased the whole in his own name, or, if he had wished to buy benamee, he would have purchased the whole in the name of some other person. But, if there were any reason why the transaction should have been carried out in such an unusual and improbable form as is contended for by Abdool Ali, Abdool Ali himself was the proper and indeed the only person who could have explained it. Tobaruck Ali is dead; Aziz, his son, is also dead. The ladies of the family are not likely to have been entrusted with the secrets between the two brothers; and, therefore, Abdool Ali himself is probably the only person who could have proved his own case. Notwithstanding this, and although there is no good reason why he should not present himself in Court, Abdool Ali abstains from giving evidence. This appears to [illegible] very pregnant omission; and, in the absence of any explanation which he could [illegible] given, we must conclude that Abdool [illegible] was only the purchaser of so much of [illegible] property as was conveyed to himself, [illegible] that the remainder of the property [illegible] purchased either by Abdool Aziz, [illegible] by some other person in his [illegible] Now it is clearly proved that Abdool Aziz was not only a minor, but that he [illegible] no means whatever of his own with [illegible] he could have effected these purchases; [illegible] as his father Tobaruck had means, and nothing is more probable than that [illegible] should have purchased the property in [illegible] son's name, and through his brother's agency, we cannot resist the conclusion that this was the real nature of the transaction, and that Tobaruck was the real purchaser and owner of the 8-anna share [illegible] Chuck Bhikari.

In this view of the case, the point which has been made as to the statute of limitation is unavailing, because, if Abdool Ali [illegible] not in possession or receipt of the rents [illegible] himself, but as his brother's agent, which [illegible] what we find, then it is clear that Abdool Ali's possession was not adverse to his brother's right :—

2. The same arguments and observations which apply to this property No. 1, apply with equal force to several others which are [illegible] dispute. Thus the estates numbered 3, 4, 5, and 8 were all purchased and conveyed by deed dated 19th April 1844, one-half to Abdool Ali, and the other half to Abdool Aziz. Again the estate No. 6 was purchased in the same way by the same parties under a deed of the 31st December 1857. The estate No. 16 was purchased wholly in the name of Abdool Aziz, and as he was a minor at the time, and had no means of his own, and as we find that Tobaruck Ali was purchasing other properties in his name,

we see every reason for supposing that this also was purchased really by Tobaruck. We think, therefore, that, as regards all these properties, Tobaruck was the real purchaser, and that Abdool Ali, although he acted as the ostensible owner, did really manage them and receive the rents and profits till Tobaruck's death as the agent of Tobaruck.

The estate No. 2 stands upon a different footing. That was bought in the name of Abdool Gunni; and Abdool Gunni, who is called as a witness, states that the property was purchased by Abdool Ali with his own money, and that he, Abdool Gunni, had nothing to do with it. To that estate, therefore, we consider the plaintiff has no claim.

Nos. 7 and 9 were given up by the plaintiff in the Court below; and Nos. 11, 12, and 13 concerned Mr. Lloyd, and not the plaintiff.

No. 10 was an ancestral property purchased by Mobaruck Ali, the father of Tobaruck Ali and Abdool Ali; and there is no reason for supposing that it was not acquired by himself, and for himself. It would thus go to the two brothers, and the plaintiff has, therefore, a claim upon Tobaruck's share of that estate.

As regards Nos. 14 and 15, Abdool Ali admits that these properties are ancestral, and that Tobaruck was entitled to his share in them; but he says, and it has been proved to our satisfaction, that many years ago Tobaruck exchanged his share in the for Abdool Ali's share of the family-house. It appears that a valuation was made at the time, by which the two properties were estimated at very nearly the same sum; and it also appears that Tobaruck's family have had the exclusive possession of the family-house ever since. We think, therefore, that the fact of this exchange is sufficiently established, and that the plaintiff's claim fails as to Nos. 14 and 15.

No. 17 will be considered in the appeal No. 87.

The result will be that, as regards appeal No. 78 with which we are now dealing, the decision of the Judge will be confirmed as regards the properties numbered 1, 3, 4, 5, 6, 8, and 10, but reversed as regards those numbered 2, 14, and 15. The plaintiff will be entitled to recover from the appellant, Abdool Ali, mesne-profits in respect of the shares awarded to her in properties Nos. 1, 3, 4, 5, 6, and 10 from the beginning of 1278 F. S. to date of delivery of possession with interest thereon at 6 per cent. per annum from the date on which they shall be ascertained to the date of realization; the amount due as mesne-profits to be ascertained when this decree is executed. That portion of the decree which awards possession of a share in Mouzah Kaliho (No. 9) and mesne-profits thereof, being contrary to the finding in the judgment, must be cancelled, and, in lieu thereof, there will be a decree dismissing plaintiff's claim in respect of this village; and so much of the decree as makes Abdool Ali liable for mesne-profits of properties Nos. 16 to 21 must be reversed. Abdool Ali has been made jointly liable with co-defendants (except the intervening defendants, Batalan and others) for mesne-profits of Nos. 16 to 21, but in respect of Nos. 16 and 17 the record shows that Shurunnessa alone has claimed these properties and that she alone has enjoyed the profits of them. Abdool Ali does not dispute the right of the plaintiff to a share in Nos. 18, 19, 20; and he disclaims all interest in No. 21; and there is no evidence on the record to support the award of mesne-profits of these four last properties against any of the defendants. It is not shown by whom they were appropriated. Noor Jehan and the representatives of Mahmudunnessa are not before us, because they have not appealed; and we cannot, therefore, rectify any error in the judgment

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of the Court below as regards their rights; but it may perhaps not be too late for them under the circumstances to appeal.

The costs in the Court below in respect of properties Nos. 1, 3, 4, 5, 6, and 10, and the mesne-profits recoverable on account of the same must be paid by Abdool Ali, after deduction of the costs to which he is entitled in respect of the claim to properties Nos. 2, 7, 9, 14, and 15, which has been dismissed, with interest at 6 per cent. from date of decree to date of realization.

We make no order as to the costs of this appeal.

The 30th May 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and W. Ainslie, *Judge*.

Mahomedan Law — Mahomedan Marriage — Legitimacy—Presumption—Substantive Evidence.

Case No. 83 of 1875.

Regular Appeals from a decision passed by the Additional Judge of Tirhoot, dated 19th September 1874.

Mussamut Butoolun and others (Intervenors, Defendants), *Appellants*,

versus

Mussamut Koolsoom (Plaintiff), *Respondent*.

Case No. 84 of 1875.

Mussamut Butoolun and others (Intervenors, Defendants), *Appellants*,

versus

Mr. Lloyd (Plaintiff) and another (Defendant), *Respondents*.

Baboo Chunder Madhub Ghose for Appellants.

Baboo Bhowany Churn Dutt for Respondents.

Where a Mahomedan lady sued for a declaration of the validity of her marriage with the man with whom she had lived, and of the legitimacy of their children; and relied upon the position which her reputed husband [illegible] her during his lifetime in his family, and on his [illegible] ment of their children, HELD, following Privy C[illegible] in Ashurfood Dowlah Ahmed Hossein Khan [illegible] Hossein Khan, that, though the presumption of [illegible] macy "follows from the bed," and legitimacy [illegible] inferred from the treatment shown during [illegible] a woman and her children, yet a Court, in deal[illegible] this subject, would not be justified in maki[illegible] presumption of fact which a rational view of the [illegible] ciples of evidence would exclude; and that, as the [illegible] of presumptions of fact must vary with varying [illegible] cumstances, and, in the present case, the circumst[illegible] were all such as to throw the Court upon direct evi[illegible] rather than upon presumptions, the Court could [illegible] in the absence of substantive evidence, allow the [illegible]

The appeal was accordingly dismissed.

The circumstances above referred to as throwing [illegible] Court upon direct testimony were, that the lady [illegible] was in the suit and might have given her evidence; [illegible] a valid Mahomedan marriage must always be [illegible] in the presence of witnesses who might have been [illegible] moned as witnesses together with the officiating [illegible] or Kazee; and that the evidence of one such wi[illegible] who had been called, actually threw doubt upon [illegible]

THIS case arises out of the same su[illegible] appeal No. 78. It is an appeal by the [illegible] vening defendants, Mussamut Butoolun [illegible] her two minor children, Abdool Rohaman [illegible] Mussamut Wahideen, and Mussamut Sa[illegible] the mother and representative of Mus[illegible] Hosaini (who is dead), and Hosaini's [illegible] son, Abdool Guffoor, against the ju[illegible] ment of the Lower Appellate Court, w[illegible] decided that Butoolun and Hosaini were [illegible] the lawful wives of Tobaruck Ali, and [illegible] their children by him were illegitimate, [illegible] consequently, not entitled to inherit [illegible] property.

Whether the learned Judge was right [illegible] so deciding is the question which we ha[illegible] to determine in this appeal.

It has been very ably argued at the b[illegible] that, although there was no actual evidence [illegible] of the marriage of either of these ladies [illegible] with Tobaruck, his treatment of them and [illegible] of their children afford such strong presumptive proof of the marriages having [illegible] taken place that the Court ought to presume [illegible] in favour of these marriages; and with regard [illegible]

children, that even supposing the should consider the evidence of the ge insufficient, the acknowledgments by Tobaruck in his lifetime of the en being his own ought to suffice to ish their legitimacy.

eral witnesses have been called to that these ladies and their children always treated by Tobaruck with great ness; that they and his acknowledged Inah Muddunnessa, had each establish- provided for them in Tobaruck's ; that he has stated to certain persons the ladies were his wives, and that on or three occasions he had spoken of the ren, both to strangers, and on one occa- to a member of the family, as his ren.

is contended that, upon the principles down by the Privy Council, this evidence to suffice to prove presumptively the iages of the ladies and the legitimacy e children, and several authorities have referred to in support of that con- on.

ese authorities have for the most part carefully discussed and considered in case of Ashrufood-Dowlah Ahmed Hos- Khan and another *vs.* Hyder Hossein an,* 11 Moore's I. A., p. 94, where the stion arose as to the legitimacy of a son claiming to be the son of the Prime nister of the late King of Oude.

In that case their Lordships say: "The sumption of legitimacy from marriage llows the bed,' and whilst the marriage ts, the child of the woman is taken to be husband's child; but this presumption llows the bed, and is not antedated by ation. An ante-nuptial child is illegitimate. child born out of wedlock is illegitimate; acknowledged, he acquires the status of gitimacy. When, therefore, a child really legitimate by birth becomes legitimated, it is by force of an acknowledgment, express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubinage may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. *A Court would not be justified, though dealing with this subject of legitimacy, in making any presumption of fact which a rational view of the principles of evidence would exclude.* The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive. The case of Mahomed Bauker Hossein Khan *vs.* Shurfoon Nessa Begum* (8 Moore's I. A. Cases, p. 159) affirms this principle. Their Lordships said in that case, which was one of legitimacy under the Mahomedan Law: 'In arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahomedan Law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof or at least without any direct proof either of a marriage between the parents or of any formal act of legitimation. Here there is, to their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference.'

"Their Lordships are not aware that these principles have ever been lost sight of in the Courts in India. They believe that they have been constantly observed by, and have guided the decisions of, their Lordships of the Judicial Committee."

* 7 W. R. (P. C. Rulings) 1.

* 3 W. R. 37.

Again in p. 116 their Lordships say: "This case then must be determined on the principles of evidence which are applicable to presumptive proof, every reasonable legal presumption being made in favour of legitimacy. *The force of presumptions of fact as evidence will vary with varying circumstances, and cannot well be fixed by decision.* The Courts have properly presumed, in many cases, both marriage and acknowledgment; for to presume acknowledgment, and to consider treatment as tantamount to it, is virtually the same thing. The loss or destruction of evidence by time or design is as likely to take place with respect to acknowledgment as with respect to any other subject; and, whilst matters of the highest import are capable of being inferred, and are inferred from circumstances, it would be a merely arbitrary limitation of legitimate inference to exempt this one subject from its operation."

It is clear from these remarks, which, we believe, do correctly embody the law upon this subject, that, although under certain circumstances the Court are at liberty to presume the fact of marriage and the status of legitimacy, and are bound moreover to make every reasonable presumption in favour both of one and the other, still the question, whether such a presumption ought to be made, must depend upon the circumstances of each particular case, and upon the evidence which has been, or which might have been, adduced in that case.

It often happens in cases of disputed inheritance that, from the death of parents and relatives, or through lapse of time or from other causes, it becomes impossible to establish the fact either of marriage or legitimacy by direct *substantive proof*, and consequently neither the parties nor the Court have materials within their reach to guide them to any certain conclusion. In such cases recourse must necessarily be had to the best evidence that can be procured; and it is that the doctrine of presumption becomes peculiarly applicable.

In this case we cannot lose sight of the fact that the ladies whose marriages are the subject of dispute were themselves parties to the suit. They intervened for the express purpose of proving their own claims and those of their children. There was no reason whatever why, if they had really married, their marriages should not have been directly proved. Other persons besides themselves would necessarily have been present at the marriages; for the Hedaya, Book II., Ch. I, lays down a positive rule that marriage, when both the parties are Mussulmans, cannot be contracted but in the presence of two male witnesses or of one man and two women. There is also the person officiating, who is styled the Mollah or Kazee, and there are generally guests. Indeed, one witness, Seelamut Ali, says, "Butoolun was married in my presence." This witness was called by the co-defendant, Shumsoonnissa; but the appellant's pleader, having got this answer out of him, stopped short and made no inquiry as to any further particulars—a very remarkable omission when it is considered that, if the witness was really telling the truth, he might have related all the circumstances of the marriage, and established it beyond all question.

This was the only attempt made to prove the fact of marriage in either case. The ladies themselves have abstained from giving evidence; not a single witness who was present, with the one exception already mentioned, has been called; and no explanation has been offered why the ladies were not examined, or other witnesses not produced.

In the teeth of this remarkable omission we think that we cannot with propriety presume the fact of marriage merely from the circumstance that these ladies and their

en were kindly treated by Tobaruck, ccupied a portion of his residence. We ot attach any real weight to the alleged rations of Tobaruck. The evidence this subject, and also as regards the led acknowledgments of the children, remely vague and unsatisfactory; and ink that, in the absence of direct sub- ive proof, which in this case might nbtedly have been adduced, we cannot de in the appellant's favour.

e appeal will, therefore, be dismissed costs. The case governs appeal No. 84, h will also be dismissed with costs.

The 30th May 1876.

Present:

Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and W. Ainslie, *Judge*.

omedan Law—Inheritance—Endowment.

Case No. 87 of 1873.

ular *Appeal from a decision passed by e Additional Judge of Tirhoot, dated e 19th September 1874.*

Mussamut Shurfoonnissa (Defendant), *Appellant*,

versus

ssamut Koolsoom (Plaintiff), *Respondent*.

oonshee *Mahomed Yusuf* for Appellant.

Baboo Bhobany Churn Dutt for Respondent.

ppellant in this case appeared as widow of the son a Mahomedan whose daughter claimed her share er father's property; and she (appellant) contended the daughter could not claim any share in two kinds roperty, namely, some lands set apart for the sup- t of a mosque, and some lands which were said to e been purchased by her deceased husband:

HELD that the payment of the expenses of the mos- e out of the rents from the property was not, in elf, a proof of an endowment, since any other rangement might at any other time have been made providing the same sum of money for the mosque; d that in the absence of evidence, the gift of the other d to the son could not be assumed.

IN this appeal the appellant has failed to show that Tobaruck Ali ever set apart the property in Sulimpore Backergunge (No. 17) as an endowment for the support of a mosque; all that we find is, that, as a matter of fact, money for the expenses of the mosque was drawn from the rents of this property; but, for anything that appears in the evidence, Tobaruck might at any time have made another arrangement for providing the money.

As to Burhona (No. 16) we concur with the Judge in the Court below in thinking that this property was purchased by Tobaruck Ali himself out of his own funds; and there is no evidence of a gift of it to his son, nor of any exclusive enjoyment of the profits by the son from which we ought to infer a gift satisfactorily established.

The Judge's decree, so far as it awards Rs. 487-13 as the value of plaintiff's share of the houses in Pukri Burai and in Backergunge, must be reversed. The plaintiff is entitled to joint possession of her share, but not to the money-value thereof.

The decree in respect of mesne-profits of Nos. 18 to 21, as already observed in appeal No. 78, is not supported by any evidence, and must be cancelled.

We make no order in respect of the costs of this appeal.

No. 88.

The only question to be considered in this appeal is whether plaintiff is entitled to mesne-profits of properties Nos. 22 and 23 from the appellant.

The remarks made in appeal No. 78 equally apply here.

The decree must be amended by reversing so much of it as declares the liability of Shurfoonnissa for mesne-profits, and we think that she ought to have her costs of the appeal.

The 2nd June 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and W. Ainslie, *Judge*.

Landlord and Tenant—Denial of Tenancy—Forfeiture of Right—Estoppel—Trespass—Khas Possession—Memorandum of Appeal—New Contention.

Case No. 1815 of 1875.

Special Appeal from a decision passed by the Second Subordinate Judge of Zillah East Burdwan, dated the 16th of June 1875, reversing the decree of the First Sudder Moonsiff of that District, dated the 22nd of March 1875.

Laljee Singh (Plaintiff), *Appellant*,

versus

Bunwary Lall Roy (Defendant), *Respondent*.

Baboo Gooroo Dass Banerjee for Appellant.

Baboo Bama Churn Banerjee for Respondent.

A tenant's denial of tenancy does not of itself give a landlord the right to khas possession.

The plea that a tenant who denies tenancy thereby qualifies himself as a trespasser, even if it were correct, could not be raised for the first time in appeal.

The Courts do not encourage litigants to change the character of their claims entirely in the last stages of a suit.

Garth, C. J. (*Ainslie, J.*, concurring).—We think there is no ground for this appeal.

The plaintiff's case was, that a tenancy did really exist between him and the defendant; but that, as the defendant in a former suit denied the plaintiff's (his landlord's) title, he thereby forfeited his rights as a tenant, and the plaintiff was entitled to recover khas possession of the land. The Lower Appellate Court found that the tenancy existed, and that the defendant had de his landlord's title, but refused to give plaintiff a decree for khas possession certain equitable grounds upon which not necessary for us to enter.

The appellant now contends that Lower Appellate Court was wrong in giving him a decree, having found the in his favour.

It appears to us, however, that the judgment upon which the plaintiff relie establish a forfeiture, and which wa evidence in the Court below, estopped plaintiff from saying that a tenancy really existed, and consequently that Lower Appellate Court is wrong in la having found the fact of tenancy in f of the plaintiff.

But then the plaintiff says, admitting no tenancy existed, still the plaint entitled to khas possession upon the gr that the defendant is a trespasser. But answer is, that this ground was not take the memorandum of appeal here, and it is an entirely different case from which the plaintiff set up in both the Courts, and it is only now, when he that he cannot succeed upon his orig claim, that he raises this new conten Whatever construction might be put the plaint now, it is evident from the in which the plaintiff shaped his case in lower Courts, and from his conten throughout, that it never entered into mind to make a claim in the way contended for. Under these circumstan even if the Court were empowered to a the plaintiff, it would not be disposed to so. We do not think we ought to encour attempts to change the whole character the case at the last moment. The appe must, therefore, be dismissed with costs.

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The 2nd June 1876.

Present:

Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and W. Ainslie, *Judge*.

's Property—Consent of Civil Court to rtgage—Mortgage invalidated by Irregu-ty—Recovery of Property sold in execution.

Case No. 65 of 1875.

lar Appeal from a decision passed by Subordinate Judge of Sarun, dated the h of January 1875.

ee Dutt Shahoo (Plaintiff), *Appellant*,

versus

Subodra Bibee, daughter and heiress Sokhey Chand, represented by her nashta, Gopee Lal, and No. 3 Lewis sserat who appeared, and No. 4 Bisses-Dutt Shahoo, and after his death, his ns, Muthooranund, for self and as brother d guardian of Brindabun, minor, No. 1 amessur Dutt Shahoo, and No. 5 Pur-esur Dutt Shahoo, who did not appear in s appeal (Defendants), *Respondents*.

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Appellant.

Arathoon and *Baboo Chunder Madhub Ghose* for Respondents.

ere a minor is, through his guardian, a party to a which, on attaining his majority, he finds has diced his interests, his proper course is, no doubt, ply for a review of judgment; but, where the pre-e to his interests arises from transactions growing f that suit, and of such a nature that a mere review dgment would prove utterly ineffectual, his only dy is to proceed against the persons in possession s rights, making his guardian, through whom have passed to those persons, a co-defendant with .

here a plaintiff, who was one of four brothers, ht, on attaining his majority, to recover posses-of his share in an estate which his brother and rdian had, during his minority, mortgaged to a third y, who, on foreclosure, had purchased the property e execution-sale, and sold it to a fourth party; and it was shown that, although the brother had been appointed guardian under Act XL. of 1858, yet he had neglected, as required by s. 18, to obtain the consent of the Civil Court to the mortgage of the minor's estate, FOUND that the brother-guardian had acted illegally when mortgaging the plaintiff's share; and HELD that plaintiff was entitled to recover possession of his property.

In this case the brother-guardian had omitted to defend the suit which had been brought on his mortgage-bond, and had allowed the property to be sold under the decree; and the judgment-creditor, who became the auction-purchaser, as well as the person to whom the property was afterwards conveyed, were both fully aware of those facts; and in an agreement made by the guardian with the holder from whom plaintiff now sought to recover, there was a passage agreeing to indemnify purchaser against any loss arising from any claim made by plaintiff.

DABEE DUTT, the plaintiff, is one of four sons of Imrit Lall Sahoo, who died in December 1863 (20th Magh 1270 F.S. or 6th Magh 1919 Sumbut); he was at that time a minor, and one of his brothers, Ramessur Dutt, obtained a certificate under Act XL. of 1858, authorizing him to act as manager of the minor's estate, with the powers conferred and limited by the Act.

Imrit Lall was a trader, and after his death the business was continued by his sons.

On the 14th July 1867 (Assar 1274) Ramessur Dutt, for himself and the plaintiff, his minor brother, and the other two brothers, Bissessur Dutt and Purmesur Dutt, gave a bond for Rs. 37,000 to Subodra Bibee, payable on the 30th Pous 1275, or February 1868; in which bond, as a security for the above amount, they pledged Mouzah Dhuboonlia and a certain warehouse in Mouzah Shamsoodinpur belonging to all the four brothers. The consideration set out in the bond is as follows: *1st*, a sum of Rs. 2,500 due on account current extending from 24th Assin 1923 S. (18th October 1866) to date of the bond; *2nd*, of Rs. 27,500 on account of bills discounted by Subodra Bibee, who carries on business as a banker at Patna, under the style of Ramkishen Futteh Chund,

the said bills having been dishonored on presentation in Calcutta; and, *3rd*, of the sum of Rs. 7,000, being the amount due to various parties on account of dishonored bills, for which they were suing the obligors.

No question has been raised as to the due execution of the bond, or the existence of the debts therein mentioned.

Subodra Bibee sued all four brothers on this bond, treating it as a mortgage-bond. No defence was made on behalf of the plaintiff by his guardian, nor by any of the other brothers. The suit was consequently taken as undefended, and a decree obtained on the 28th March 1868, directing a sale of the mortgaged property.

The property was accordingly put up for sale under the decree and bought by Subodra herself on the 1st June 1868, through her gomashta, Gopee Lall, who has been made a defendant in this suit.

On the 16th November 1870, Subodra sold the purchased property and her outstanding rights under the decree to Mr. Lewis Cosserat, who had already purchased the indigo factory in Mouzah Dhuboonlia, from the four brothers (the plaintiff being represented by his guardian Ramessur Dutt) under a conveyance dated 9th January 1868.

Dabee Dutt having attained majority now sues to recover possession of his share of the property from Mr. Cosserat, upon the ground that it was illegally mortgaged by his brother and guardian, and that, notwithstanding the proceedings and sales which subsequently took place, he has a right now to regain possession of his estate.

The Subordinate Judge held that the suit was not maintainable, on the ground that the plaintiff was by his guardian a party to the suit on the bond instituted by Subodra Bibee, and that sections 2 and 3, Act VIII. of 1859, bar any other remedy than a review of judgment in that suit, especially as he does allege that the bond was a fraudulent one.

Without going at length, however, into general question how far a minor is bo by a decree made against his guardian ing his minority, we think it clear that this case the plaintiff was entitled to b the fresh suit for the purpose of asserting rights, and that, as against the present defe ants, it was the only effectual rem which he could pursue. If his object h merely been to reverse or alter the judgm in the former suit, it is possible that application for a review would have swered his purpose. But the plaint object was to unrip transactions which form no part of the proceedings in the form suit; and as against Ramessur Dutt, merely acted in that suit as the plaint guardian, and as against Mr. Cosserat had nothing whatever to do with the form suit, it is obvious that any application the review of the proceedings in that would have been utterly ineffectual, that, as against these persons, the plaint only remedy was the one which he adopted. His contention and his interest this suit are not identical with, but direct opposed to, those of Ramessur Dutt.

He says that Ramessur, acting professedly as his guardian, has been dealing wi his property in a way which the law express forbids, and that, in consequence of having so dealt with it, and also in consequence of certain legal proceedings in which Ramessur has improperly acquiesced, his (the plaintiff's) share of the mortgaged property has wrongfully come into the hands of Mr. Cosserat, and his object is to release his share of the property from the position in which it has been placed by the wrongful acts of his guardian.

The first question, therefore, which we have to decide is whether the defendant, Ramessur, was acting illegally when he mort-

the plaintiff's share by the deed of 4, 1867. It is admitted that he was ed guardian of the plaintiff under Act 1858, and that he never obtained the n of the Judge to the mortgage, as by 18 of that Act he was bound to do. ords of that section are: "No such per- i.e., guardian of the estate under a certifi- anted under the Act) "shall have power or mortgage any immoveable property, grant a lease thereof for any period ing five years, without an order Civil Court previously obtained." ame words are used in section 14, XXV. of 1858, limiting the powers of nager of a lunatic's estate, and it was by Mr. Justice Phear and Mr. Justice e in a case reported in 19 W. R. that, after the passing of that Act, no er *de facto* or *de jure* can have to do that which the Act forbids. 4 W. R. 46, there is a decision of Justice Macpherson and Mr. Justice ord in an appeal, in which the only ion was the effect of section 18, Act XL. 8, and it was held that a sale made by rdian without authority from the Court invalid, even though the purchaser had d honestly and paid a fair price.

n the other hand, a case was relied upon the defendants in 22 W. R. 77 ded by Markby and Mitter, JJ., from h it would appear that those learned es considered that a mortgage of a or's property by his guardian without consent of the Court was a mere irre- rity. But we have consulted Mr. ice Markby, who delivered the judgment that case, and who informs us that, ough the word "irregularity" might e been used, it was by no means the tention of the Court in that case to treat e conduct of the guardian in mortgaging ward's property without leave of the urt as any other than a direct breach of the law; and we find also that before Mr. Justice Macpherson and Mr. Justice Lawford delivered judgment in the case, 24 W. R. 46, they also consulted Mr. Justice Markby and Mr. Justice Mitter, and that the judgment in the latter case was given with their express concurrence.

The ground of the decision by Justices Markby and Mitter in 22 W. R. 77, was that events had subsequently transpired in that case, which induced the Court to hold that the mortgage, though improper and unauthorized in the first instance, ought to stand, more especially as in the suit which was afterwards brought upon the mortgage-deed, and in which a decree was obtained, the minor himself was properly represented. Their decision, therefore, will be found not to conflict with the view which we take in the present case.

In this case, we are of opinion that in mortgaging the plaintiff's share without the sanction of the Court, the defendant, Ramessur, was undoubtedly dealing with his ward's property in a way which the law forbids, and that in not defending the suit brought upon the mortgage-bond and allowing the property to be sold under the decree, he was improperly sacrificing his ward's interests.

Subodra Bibee, the mortgagee, took the mortgage, carried on the suit, and purchased the property with full knowledge of Ramessur's conduct; and the defendant, Mr. Cosserat, had also notice that Ramessur had been dealing with his brother's property in a way unwarranted by law, because it appears that there was an agreement, dated the 5th February 1868, made by Bissessur, Ramessur, and Purmessur with Mr. Cosserat, reciting that Ramessur had been appointed guardian of his minor brother, Dabee Dutt, and that he, as such guardian, and for himself, together with his other two brothers, had, on 9th January 1868, sold the

Dhubooulia Indigo Factory to Mr. Cosserat. The agreement then goes on to *indemnify the purchaser, specially in respect of any claim that might be thereafter put forward by the minor brother, Dabee Dutt,* and generally in respect of any other claims.

This document shows that Mr. Cosserat must at least have understood that in purchasing the minor's property he was on dangerous ground, and having this knowledge, he was bound to satisfy himself that the mortgage-bond had been duly executed under the authority of the Civil Court as required by law. He cannot say that he was a *bonâ-fide* purchaser for value *without notice,* for he certainly had notice that Ramessur Dutt's power of dealing with his ward's property was only such as a guardian appointed under Act XL. of 1858 could exercise, and he was, therefore, bound to inquire whether the mortgage had ever been sanctioned by the Court.

As a purchaser from Subodra, he could take no better title than she had, and unless the decree protected her title it does not secure his. But she cannot be protected by the decree. She knew from the first that Ramessur had acted in a manner unauthorized by law; she knew that the suit on the mortgage-bond had been undefended, and further, that notice of that suit had not been given to any one, but to those whose interests were opposed to those of the minor. But then it was urged very strongly by the defendants' pleader that, if the debts for which the bond of the 14th July 1867 was given were debts due by the father, or if they were debts incurred by all the brothers in carrying on a business which they had a right to carry on at the risk of the plaintiff, Ramessur would have been justified in giving a simple money-bond at reasonable interest for the payment of those debts, and that upon that bond a decree might have been obtained by the bond-holder, and the property in question sold under that dec It was then argued that the instru of the 14th July 1867 was only a b of this description, with a mortgage of property in question superadded by w further security; that the suit was fou upon the personal obligation of this bo as well as upon the mortgage security; th consequently, the defendant had a right sever one portion of the instrument fr the other, and to insist that there was q sufficient cause of action to support decree without reference to the mo gage portion of the transaction. assuming, for the purposes of argum that in this instance the mortgagee co have severed one portion of the inst ment from the other (which is at le doubtful), and that she could have sued the deed of July 1867 as a simple mo bond, and obtained a decree in that and sold the plaintiff's share of property, the answer is, *that in fa of fact she has not adopted that cou* She has sued upon the instrument as mortgage-bond. She has obtained a dec upon it as a mortgage-bond; the decree such as she could not have obtained she had sued merely upon the perso obligation, and it was under that dec that the property has been sold. Th defendants, therefore, cannot now chang the nature of that suit, or the for of the decree, for the purpose of placin themselves as purchasers under that decre in a different or better position; and, as we find that Subodra and Mr. Cosserat were both affected with notice of Ramessur's improper conduct, we consider that the plaintiff is entitled to succeed in this suit as against all the defendants, and to recover possession of his share from Mr. Cosserat.

The appeal must, therefore, be allowed with costs, and interest as usual payable by the respondents who have appeared; and

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aintiff must be declared entitled to r the property in suit, with costs g interest at 6 per cent. per annum date of decree of the lower Court e by Ramessur Dutt Shahoo, Subodra and Mr. Cosserat.

The 9th June 1876.

Present :

e Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

ence of Survey-map—Loss of Title by Non-possession.

Case No. 477 of 1875.

l Appeal from a decision passed by Zillah Judge of East Burdwan, d the 16th December 1874, reversing ecree of the Officiating Moonsiff of wkee Culna, dated the 29th November 3.

rosonno Chunder Roy and others (Plaintiffs), *Appellants,*

versus

and Mortgage Bank of India, Limited, d others (Defendants), *Respondents.*

R. E. Twidale and *Baboo Grija unkur Mujoomdar* for Appellants.

oos Bhobany Churn Dutt and *Kashy Kant Sein* for Respondents.

re a plaintiff claimed to be holding certain lands two puttees, and the defendants contended that f's possession extended only to the cultivated and the uncultivated plots of the said lands ; but the -map showed that the land in suit fell within ff's area, and that it was distinguishable from ands falling within the same boundaries which een specially reserved by the talookdar, HELD ough the testimony of a survey-map was not conclusive, it should not be disregarded unless there was clear and direct evidence to the contrary.

It having been pleaded in this case that plaintiff had not actually occupied the land in suit, HELD that Courts should be very careful before holding that title has been lost merely by non-possession.

IN this case we feel bound to reverse the judgment of the District Judge. The matter at issue between the parties was a very simple one. The plaintiffs alleged that they held two puttees, Bashudebpore and Bistupore, and that the land in dispute was included within those puttees. The defendants' case was, that those puttees were demised to the plaintiffs exclusive of puteet and *danga* lands; in other words, that they had a lease of the cultivated lands, and not of the uncultivated lands. The Judge, in the first instance, when the case was before him on appeal, remanded the suit for the trial of an issue which substantially raises that question, and another issue which raises the question of limitation. The Moonsiff, relying chiefly upon the survey-map, found that the lands in dispute were included within the ambit of these puttees, and were also part of the lands let to the plaintiffs. The Judge, upon the case coming before him again on appeal, reversed the decision of the Moonsiff, but upon grounds which appear to us altogether unsatisfactory. The District Judge says, in the first place, that "the "evidence of the plaintiff's witness, Koo-"muruddin, shows that these lands lie to "the north of the plaintiffs' puttee lands, "that is, outside them." Now, it has scarcely been contended before us that that is a right construction of this witness's evidence. What he really says is this, that he does not know the disputed lands, but that a certain danga (which other witnesses show to be a portion of the disputed land) lies in the northern field of the plaintiffs' puttee. Therefore that part of the District Judge's judgment proceeds upon a misapprehension of what this witness stated. It is next said

that "the lands were demarcated at the Government survey in 1855 with the puttees," and that the talookdar at that time made no objection, and that "the plaintiffs' possession was admitted;" but the District Judge says, "That does not show conclusively that he (*i. e.*, the talookdar) gave up his title to them." It is, however, not a question whether or no the talookdar gave up his title. The question is whether he had already granted these lands by a lease to the plaintiff; and the survey-map was excellent evidence for the purpose of showing that that had been done, because it appears upon the survey-map that certain chucks had been retained by the talookdar out of these two puttees, but those are specified, and the Ameen's report shows that the land now in dispute is not included in either of those chucks. Of course, the District Judge is perfectly right in saying that the survey-map is not conclusive. But, unless there is clear evidence to the contrary, he ought certainly to have acted upon the survey-map, supposing the survey-map to be, as it is in this case, distinctly in favour of the plaintiff. Then the next paragraph of the District Judge's judgment is one which is extremely difficult for a Court of Appeal to deal with. The District Judge was there treating of a matter which, in a case of this kind, always requires to be handled with very considerable care, namely, that of possession of land which has been lying uncultivated for a very considerable period. It was no doubt competent for the District Judge, if he came to a clear conclusion upon the evidence that the plaintiff had had no possession whatever, had exercised no acts of ownership whatever over these lands for a period of more than twelve years, to hold that he had lost his title. But, as has been pointed out in several cases amongst others in the very case in 23 W. R., which was quoted to us by the pleader for the respondent in cases of this kind, great care must be taken bef holding that the title is lost merely by n possession. The District Judge comes no clear conclusion upon that point. It thrown in as an observation that the e dence of possession within twelve years not sufficient, but it is found that the pla iff has been trying to settle and culti these lands for a considerable period, whi seems scarcely consistent with the obser tion. In fact in all these respects judgment of the District Judge is so uns factory that the pleader for the respond did not even contend that it could stand it is, and confined himself to asking the Co to remand the case again, that is to say, have it heard a fifth time, for this is alre the fourth hearing. We do not consider to be our duty to remand this case ag We think that, if the case be really looked there is nothing upon which the Co below would be justified in departing fr the clear statement of the survey-map, or finding that the plaintiff has lost his t simply by non-possession. The survey-m clearly shows that the plaintiff was t treated as the holder of these lands. Th is really nothing as regards title to p against that; and as regards possession, t evidence is not in any way disbelieved b the Court below, and in a case of this ki we think that it is sufficient to prevent t title being lost. We therefore do not co sider it necessary to prolong the litigati by a further remand. We think no Cou if the case were properly tried, could com to any other conclusion than that come t by the Moonsiff. Therefore we *restore* the judgment of the Moonsiff, and reverse the decision of the District Judge, and *give* the plaintiff a decree for possession with costs in the Lower Appellate Court and in this Court.

The 10th June 1876.

Present:

e Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

r Possession—Ejectment by Auction-pur-—Encumbrances on Estate—Limitation.

Case No. 307 of 1874.

ar Appeal from a decision passed by the dge of Midnapore, dated the 25th Au- 1874.

Dyal Khan, Ramessur Khan, Ram mho Khan *alias* Bhooloo Baboo, Ram un Khan, Mungul Chand Bangally, na Lall Lohata, and Ram Coomar tt (Plaintiffs), *Appellants,*

versus

h Ojoodhya Ram Khan (Defendant), *Respondent.*

Kennedy and *Baboos Umbica Churn ose* and *Bhoyrub Chunder Banerjee* for Appellants.

rs. Woodroffe and *W. C. Banerjee* and *boo Boydonath Dutt* for Respondent.

tiffs are representatives of a person who in received a hereditary estemraree mowrosee lease the zemindar. The estate was sold for arrears in and bought in by Government, who, however, d the estate to the zemindar with all its encum- s, whereof plaintiffs' mowrosee lease was one. iffs' predecessor in title accordingly recovered sion of the land under that lease. While he was in sion, another person took possession of the estate chasing the right of a mortgagee, in whose favour emindar had executed a bond; and that person lently and collusively arranged a sale of the for arrears of revenue in such a way as to ensure ing bought, free of all encumbrances, by a fourth y. Plaintiffs' predecessor in title was dispossessed is person, and could not recover possession, because, ng as the sale for arrears held good, it extinguished estemraree lease. But the zemindar coming to w of the fraud by which these results came about the person who came in by them, and got him ousted. Plaintiffs now sue for a recognition of their status by the zemindar:

HELD that plaintiffs have a right to call upon the zemindar to restore them to their tenure as one of the encumbrances existing at the time of the sale:

HELD, also, that, if such a right as that claimed by plaintiffs exists, it cannot be barred by limitation.

(This case, which closely resembles No. 308 of 1874, differs from it in this respect, that, after the restoration of the estate to the zemindar in 1840, plaintiffs took possession of their old rights under him; and the fraudulent sale took place while they were in possession.)

Markby, J.—THIS was a suit in some respects similar to that to which Regular Appeal No. 308 of 1874 relates. There is, however, at least one very important distinction between the two cases, and it is unfortunate that the vakeels in the Court below admitted that the judgment in that suit governed this also, and that the District Judge adopted this view.

This case was also disposed of in the Court below upon the settlement of issues, and in this case, as in the last, there is a difficulty about discovering upon what cause of action the plaintiff really relied in the Court below. It has, therefore, become necessary, in this case also, for the plaintiffs to state their case, and that case is as follows:—

The plaintiffs are the sons of Sreemunto Lall Khan, the son of Chooney Lall, together with certain other persons. All the plaintiffs claim the property in dispute either by descent or by purchase from Chooney Lall Khan, who, they say, on 24th Bysack 1225, *i. e.*, about the year 1818, took a kaimee estemraree lease of the land in suit at a fixed jumma of Rs. 1,189-10-7; the tenure was hereditary, and Chooney Lall held possession till his death. After his death Sreemunto Lall took possession, and whilst he was in possession the zemindary was put up to sale on the 1st September 1837 for arrears of Government revenue and was purchased by Government for one rupee. The Government, although this sale was not set aside, gave back on the 22nd July 1840 the estate

to the Rajah, subject to all the incumbrances which existed previously to the sale for arrears of revenue, whether those incumbrances had been by reason of the Government sale previously destroyed or not. Accordingly, Sreemunto Lall recovered possession of the land in dispute on the above date by virtue of his estemraree lease, and he held it with all the rights and advantages which had been granted by that lease as well as subject to all its conditions, so that in point of fact what was done amounted to a new grant. During *the time* he was thus holding possession, Mr. Abbott took possession of the zemindary by purchase of the right of the mortgagees under a mortgage executed by the zemindar in favour of Ashutosh Deb and others; and having privately arranged to sell the zemindary to Mr. McArthur, and to secure to the latter a property free of all the incumbrances and settlements created by the former zemindar, they both colluded together without the plaintiffs' knowledge, and with a view to deprive the plaintiffs and the Rajah-defendant of their rights and interests by means of fraud, Mr. Abbott, in collusion with Mr. McArthur, suffered the Government revenue of the zemindary to fall into arrears, and thus collusively and fraudulently brought about the illegal auction-sale of the zemindary in the Collectorate on the 29th April 1848, when it was purchased by Mr. McArthur. On the strength of the title acquired by Mr. McArthur under the provisions of Act I. of 1845, he dispossessed Sreemunto Lall of the property claimed. Afterwards, upon the death of Sreemunto Lall, the plaintiffs became his representatives, and, as they were not aware of the irregularities and fraud connected with the above auction-sale, they brought a suit No. 65 of 1859 in the Principal Sudder Ameen's Court in this district against Sidi Nuzzur Ali Khan and others, who were then in possession of the zemindary by virtue of purchase from the aforesaid auction-purchaser, recovery of possession of the dis mehals, on the allegation that Sreem Lall had been forcibly and illegally di sessed, inasmuch as his tenure could be extinguished under the provision Act I. of 1845, but the suit was dism by the late Principal Sudder Ameen, Davidson, on the 13th March 1860, on ground amongst others that the auction chaser had the right to eject the subordi malguzardars.

Subsequently, the zemindar-defend Ojoodhya Ram Khan, being aware of fraud and artifice by which the a revenue-sale had been brought about, i tuted a suit in the Civil Court in this trict against the parties who were th possession, *viz.*, Sidi Nuzzur Ali Khan others, for recovery of possession of zemindary with mesne-profits by setting the said fraudulent sale. And the said artifice, machination, fraud, and c sion being satisfactorily established in opinion of the late Judge, a decree passed in favour of the Rajah on the September 1866 for possession with profits, and the above fraudulent auc sale was set aside. The said decree affirmed by the High Court on the September 1867, and has become fi The Rajah having taken out execution the above decree finally recovered pos sion of the zemindary on the 11th J 1871. The second sale for arrears Government revenue was also not set as but the Court held that it was fraudule and, therefore, that it could not create estate which could be set up against Ojoo dhya Ram; and when Ojoodhya Ram recovere possession in 1871, then, inasmuch as th sale of the property in 1848, by which Ojoo dhya Ram was ousted from possession, wa a sale for arrears of revenue, the provision of section 29 of Act I. of 1845 are appli

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d the plaintiffs have a right to call e defendants to restore them to their s being one of the encumbrances at the time of sale.

Counsel for the defendants objected plaintiffs' being allowed to set up e upon the general ground stated in case, and also that the plaintiffs ound to state the particulars of the ment upon which they rely, and the pon which the tenure was restored; plaintiffs are also bound to allege that of the tenure had been paid. The nts also further contended that the s now put was disposed of by the 1859, or that, at any rate, if not dis- of, that the plaintiffs ought then to t it forward and obtained a decision .

d not repeat the reasons why I con- at the first of these objections cannot For the reasons stated in the judg- Regular Appeal No. 308, I do not that the plaintiffs are prohibited by n raising any of the questions which w seek to raise, or making any of the ons which they now seek to make.

o the objection that the plaintiffs are to state the particulars of the arrange- upon which they base their claim, it e observed that the plaintiffs state, ffer to prove that Sreemunto Khan y got into possession of his tenure, d it for a considerable period. The ents relating to the arrangement were ed in this suit probably because they iled in the other. I do not, however, er the plaint to be bad because the ement is not more fully set out, but I he defendants may reasonably require aintiffs to state upon what documents ly, and require them to file those docu- or such copies thereof as they intend to pon at the trial: of course, the defend- will also be at liberty to require any amendment of the issues they may deem necessary. As to the payment of rent, there can be an issue upon that point if it is desired, and the Court below will decide at the trial upon whom the *onus* of proving that issue lies, and what is the effect of that issue not being proved.

As to the objection that the claim of the plaintiff was disposed of by the suit of 1859, or that, if not disposed of, it ought to have been put forward in that suit, it seems to me that the cause of action as now stated did not then exist. That was a suit to contest the auction-purchaser's right under a revenue-sale. This is a suit to enforce the rights of a tenure-holder against the original proprietor who has recovered possession.

With regard to the question of limitation upon which alone the District Judge appears to have dismissed the suit, it does not appear to me that the suit can at this stage be dismissed upon that ground. The plaintiffs' case, shortly stated, is that they were ousted by the purchaser under a revenue-sale, that the defaulting proprietor was restored to possession in 1871, and that he, consequently, acquired the estate subject to their tenure, to which, therefore, they have a right to be restored. That right, if it exists, cannot be barred by limitation.

In my opinion, therefore, the decree of the lower Court dismissing the suit ought to be set aside, and the suit remanded to the District Judge of Midnapore for re-trial. The costs hitherto incurred in this Court and the Court below will abide the result.

Mitter, J.—I concur.

The 12th June 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt., Chief Justice*, and W. Ainslie, *Judge.*

Khas Possession—Plaintiff bound by his Claim—Evidence.

Appeal under section 15 of the Letters Patent, preferred on the 6th of April 1876, against the decree of the Hon'ble F. A. B. Glover, one of the Judges of this Court, dated the 15th of March 1876, in Special Appeal No. 1608 of 1875.

Gunee Gazee, Defendant (Special Respondent), *Appellant,*

versus

Anundo Chunder Chundra, Plaintiff (Special Appellant), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Nil Madhub Bose for Respondent.

Where a plaintiff sought to obtain khas possession of a property which he declared he had leased to defendant, but for which defendant had ceased to pay him rents; and, having filed a decree given against himself in a former suit, obtained a remand order from one of the Judges of the High Court. HELD by a Bench of the Court that the decree against plaintiff in a former case did not bind the defendants in this one; and that the plaintiff, having elected to establish the falsehood of the claim set up by the defendants to the land in suit, and having failed to do so, the remand order should be re-called, and the case dismissed.

The question was raised in this suit, but left cided, whether the decree filed by plaintiffs in th ought to have been received as evidence at all.

Garth, C. J.—THE plaintiff in the sent suit, as I understand, alleges th 1868, he let the property in suit to defendant; that the defendant paid him for a time, but after that for three yea paid him no rent at all, and denied his t He, therefore, now brings this suit to rec khas possession of the land, which h to the defendant in 1868.

Now all these statements made by plaintiff are substantially found by the L Appellate Court to be false. That C says, in effect, that the plaintiff has en failed to prove his case.

Then it is said, that the Lower App Court was wrong in rejecting a decree w was made in 1867, in a suit brought third party against the present plaint respect of these very lands.

Now, even if the proceedings in that were admissible in this suit at all, I fa see how they could properly be used e tually as against the present defendan consider that the plaintiff ought to be by the course which he has thought f take.

He has failed to make out a *primâ-f* case, and it has not even been thought ne sary to call upon the defendants for answer. I, therefore, fail to see how decree, which was obtained in a suit bro against the plaintiff in 1867, and w appears to have been unsuccessful, ou properly to have any weight whatev against the defendants, or could possi make the plaintiff's case, as set up in hi plaint, any better.

I should add, speaking for myself, that consider it extremely doubtful, whether thi decree was admissible in evidence at all i this suit. That question, which is an import ant one, may possibly, at some future time

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sidered by the Court; but for the of this case it is not necessary to it, because the Moonsiff has, in fact, d the decree in evidence, and the nal Judge, as I understand him, has cted it, but he considers that it ought be binding as against the present ants. What he says is, supposing he subject-matter of that suit was al with the subject-matter of this, ot see how the decree of 1867 ought, the circumstances, to affect the defend- ere. I also fail to see how it should the defendants.

n, therefore, of opinion that the remand of Mr. Justice Glover should be set and the appeal to the High Court dis- d with the costs of both hearings.

slie, J.—It seems to me that er this decree of 1867 be admit- evidence in this case or not, is wholly terial. The plaintiff had been defeated e defendant in the former rent-suit, in the defendant set up the title on which w relies. He comes into Court to assert le against the defendant, and to recover ssion of the property from him. It open to him to do so in various ways. elected one particular way, which was to blish the falsity of the claim set up by defendants, by proving that the defend- entered into engagements with him ch were wholly inconsistent with that m. In respect of the proof of those agements, this decree is absolutely value- s.

The Judge has found on oral evidence that plaintiff has altogether failed to make out e case which he set up, and it seems to me at he could, under the circumstances, do no herwise than dismiss the suit.

The 12th June 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Secondary Evidence—Limitation.

Case No. 606 of 1875.

Special Appeal from a decision passed by the Zillah Judge of East Burdwan, dated the 31st of December 1874, affirming the decree of the Second Moonsiff of that District, dated the 22nd of July 1874.

Mussamut Sadeeroon Nissa Bibi and others (Plaintiffs), *Appellants,*

versus

Sreemutty Shourubby Debea (Defendant), *Respondent.*

Moonshee Serajul Islam for Appellants.

Baboo Rash Behary Ghose for Respondent.

Where a person's claim to some property rested on a hiba which had been executed in her favour by the brother of the parties who contested her claim to that property; and the hiba had not been made over to her because it related to various properties of which the property claimed by her formed only a portion; and one of the defendants, whom she had called on to produce the hiba, had failed to do so, HELD that plaintiff was entitled, under s. 65 of the Evidence Act to procure secondary evidence of its contents; and, having done so, to get the decree which the first Court had given her, and which the High Court now refused to set aside.

The presumption arising against the owner of a right, which has been allowed to lie dormant for four years, may be rebutted by evidence of unquestionable ownership in the first instance, backed by limitation running on for twelve years.

THIS case, when it originally came before the Court, was, no doubt, one of some difficulty, because the plaintiffs, who were the undoubted heiresses of their father, to whom this property had originally belonged, called upon the defendant to prove her title; and one step in the proof of her title was that her vendor, Heroo, who was the brother of the plaintiffs, had obtained this property

by a gift from his father in his father's lifetime, and inasmuch as the defendant was only a purchaser of a very small portion of the land comprised in the hiba, she was not in possession of that document. But there was this circumstance in her favour that the plaintiffs, alhough their father had been dead 11 years, had never made any attempt up to this time to assert their right as heiresses to this property.

The Moonsiff dealt with the case in this way. He keeps this last mentioned fact in view when dealing with the evidence, but, nevertheless says that, inasmuch as the plaintiffs were, undoubtedly, the heiresses of their father, and as their father had died within 12 years, they would be entitled to get possession, unless the defendant could make good her defence of a hiba from Afzul to Heroo; and that was, in our opinion, the correct way of dealing with this case. The defendant had not succeeded in her attempt to procure the production of the hiba, and the Moonsiff proceeds to give his reasons for considering why the defendant was at liberty to give secondary evidence of the contents of the hiba. Monsoor, who was a defendant in this case, had been ordered to produce it. He had not done so, and the Moonsiff gives his reasons why he considered that there had been a hiba; and that the hiba had been acted on in certain arbitration proceedings; and believing as he did, that the hiba existed and was in the possession of Monsoor, he allowed secondary evidence to be given of it; and even if there was any doubt whatever as to the sufficiency of the case so made for the admission of secondary evidence, the course taken by the Moonsiff is justified by section 65 of the Evidence Act, which Mr. Justice Mitter pointed out in the course of the argument, and which provides that when the party offering evidence of the contents of a document cannot, for any reason not arising from his own defa neglect, produce it in reasonable time, he can give secondary evidence. This is fully covered by that provision. the Moonsiff goes on to show tha thoroughly reliable witnesses gave evi with regard to the contents of the hiba that these persons had the knowledge contents. The Moonsiff also made a many other observations in the case f purpose of strengthening what I ha ready mentioned as the substance o judgment.

With regard to the objection tha made that possession had not passed to make this gift a valid one unde Mahomedan Law, the Moonsiff says "this objection is not taken in proper "and no issue has been raised on the "and neither party has adduced any "evidence on this point."

It appears to us that, under the cir stances of this case, the Moonsiff was justified in dealing somewhat strictly the plaintiffs. If it was the intention o plaintiffs, after this long period of time elapsed, to call upon the defendant to that the hiba had been acted upon, it their duty to give notice at the proper that it would be necessary for her to d her evidence to that point.

Upon the whole, we think that the M siff's judgment is thoroughly well foun both in law and in justice, and is a reasoned one; and that judgment has b in no way disturbed by the District Judg

In one point the District Judge misap hended what the Moonsiff's judgment re was. He seems to think that the Moonsiff b come to the conclusion that the plaint had not made a sufficient *primâ-facie* c to enable them to succeed on the ground inheritance. The Moonsiff, on the contra clearly expressed his opinion that a sufficie *primâ-facie* case had been made out by t

d

iffs, requiring the defendant to make er title; and what the Moonsiff found that that title had been made out. This, ever, in no way renders it necessary for to interfere with the judgment of the rt below. The judgment of the Moonsiff not been disturbed by the District Judge, we are quite willing to rest our judgt upon the judgment of the Moonsiff. We dismiss the special appeal with costs.

The 17th June 1876.

Present:

e Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

ree on Arbitration-award—Separation in less—Partition—Limitation—Commensality —Joint Responsibility.

Case No. 413 of 1875.

cial Appeal from a decision passed by the Subordinate Judge of Zillah Manbhoom, dated the 10th of August 1874, reversing a decree of the Moonsiff of Chowkee Manbhoom, dated the 27th of March 1872.

oun Mundul and another (Plaintiffs), *Appellants,*

versus

Nadyar Chand Roy (Defendant), *Respondent.*

Baboo Bunsheedhur Sen for Appellants.

aboo Rash Behary Ghose for Respondent.

Where two brothers sought to recover possession of at they alleged to be their share in some property inrited jointly by them, through their father, and by eir uncles, from a common ancestor; and relied on a arbitration-award of 1863, whereon a decree had been sed, which recognized their interest in the property; t defendants contended, *firstly*, that plaintiffs' claim as barred by limitation; and, *secondly*, that some antecedent action on the part of the plaintiffs themselves had shown that they had regarded the property as belonging exclusively to the defendant's predecessor in title, HELD, *rstly*, that, although the decree of 1863 recognized the parate rights of plaintiffs, yet, as plaintiffs were mere minors at the time, and no separation in mess actually took place, and the family-property was treated by the members of the family as joint, until the year 1269 (A.D. 1862), the suit was not barred by limitation; but, *secondly*, that as, in subsequent proceedings, the property in suit had been treated by all the members of the family as the exclusive property of defendant's predecessor in title, and plaintiffs had taken no steps either to prevent its being mortgaged, or to prevent its sale in execution on foreclosure of mortgage, though they were aware of both facts, the suit must be dismissed.

FOUND, also, collaterally, that one of the plaintiff's brothers, who protested against being bound by the action of his uterine brother, had been living in commensality with that brother, and had allowed him to act for him in executing a deed of sale, and in other respects; and HELD that the protesting plaintiff was bound by the proceedings of his brother.

Mitter, J.—THIS case was remanded to the Lower Appellate Court on the 31st March 1874, it having been then found that the judgment of the Lower Appellate Court was erroneous on the matter of the construction of an arbitration-award, which was on the record as an exhibit on behalf of the plaintiffs. On remand, the Lower Appellate Court has come to the same conclusion at which it arrived on the first occasion, and, differing from the Moonsiff, it dismissed the plaintiffs' suit.

The plaintiffs have preferred this special appeal, and, when it was argued before us, it was contended that the judgment of the Lower Appellate Court was erroneous, inasmuch as certain decrees, which could not be legally treated as evidence in the case, were relied on by the Lower Appellate Court.

We considered that this objection was well-founded, and as the case had already been remanded once, we suggested to the parties that it would be better if the case be disposed of by us on the evidence, the parties very properly consented to that course, and the case has now been argued, and the evidence adduced by the parties has been laid before us.

The question in this case is whether the

plaintiffs are entitled to a certain share, namely, 3 annas and 4 gundas, of Mouzah Chakdoba. The plaintiffs' allegation is that they are two out of five sons of one Goluk Mundul. The defendants' predecessor in title, Bungshee Mundul, was the eldest of these five sons. The plaintiffs allege that the share of all the sons of Goluk Mundul in this mouzah was 8 annas, the other 8 annas belonging to their uncles, the brothers of Goluk Mundul. The plaintiffs, therefore, are entitled to two-tenths, that is, 3 annas and 4 gundas share, and they were in possession of this property through the managing member of the family, Bungshee Mundul, until they were ousted in November 1867, when it was sold in execution of a decree against Bungshee Mundul and purchased by the defendants.

The defendants allege that Chakdoba was the exclusive property of Bungshee Mundul alone; that the other members of the family never had possession of any share in this mouzah; and that, consequently, as it was the exclusive property of Bungshee, the plaintiffs were not entitled to any share.

The defendants also contended that the plaintiffs' claim was barred by limitation.

It appears that, in the year 1861, there was a litigation between the members of this family regarding this property. That was a suit brought by the plaintiffs' uncles against the plaintiffs themselves and their brothers for the recovery of their ancestral share in the family-property including Chakdoba. That suit was referred to certain arbitrators; and the arbitrators came to the conclusion that Chakdoba was divisible amongst the members of the family according to their respective shares devolving upon them by right of inheritance. Upon this award a decree was passed in 1863 in favour of the uncles in conformity with it. Therefore, although, by that decision, the plaintiffs and the defendant are not conclusively bound, because the plain and the defendant's predecessors in were arrayed as co-defendants in that c yet, if there had not been anything el the record, we would not have justified in disregarding this decree. there were subsequent dealings with property, to which I shall presently which substantially established that, withstanding that decree, all the memb of the family treated this property as exclusive property of Bungshee alone.

But, before I refer to those transactio would be convenient here to dispose of plea of limitation which was also relied by the defendants. With reference to question, it appears to me that, although th was that litigation in the year 1861, res in the decree of 1863 by which the shar the different members of the family were fined and declared, yet no formal steps taken by the parties to have their proper partitioned, and it is evident from the evide of both plaintiffs and defendants that, withstanding the decree, the different m bers of the family continued to remain possession of different properties as did previous to that decree, and nothing done to carry out the directions of th decree, and the family-property was ne divided.

We also find with reference to the qu tion of separation in mess that in 18 when that decree was passed, the plaint were minors. The decree also treated th plaintiffs and other brothers as representi one joint family. Then we have the furth fact that the witnesses examined by th plaintiffs clearly depose to the fact that separation in mess did not take place until the year 1269. Against that evidence, the defendants have not adduced anything which can be taken as sufficient to rebut it. Therefore, on the question of limitation, we are inclined to hold that the separation in mess

did not take place more than twelve years before the institution of the suit, and that, notwithstanding the decree of 1863, the family-properties were treated by all the members of the family as joint.

But as I have already said that the plaintiffs' claim must fail upon the ground that the parties, after the decree of 1863, dealt with this property in such a way as would reasonably lead to no other conclusion than this, that they acquiesced in the exclusive title of Bungshee.

It appears that, in the year 1865, one of the plaintiffs, Jeebun Mundul, joined with Bungshee and another member of the family, namely, Durpo Narain Mundul, in executing a kistbundee in favour of the defendant, Nadyar Chand. In that kistbundee, Bungshee mortgaged the whole of Chakdoba as security for the loan taken by him, and the property was described as the exclusive property of Bungshee. A decree was obtained some time after upon that kistbundee, and we find that in the year 1867 the same Jeebun Mundul paid up his quota of the debt by a petition, asking the Court to release certain property which was under attachment, and which, he said, he and his brother, the other plaintiff, had sold to a third party.

It appears also that, at that time, Chakdoba was under attachment in execution of the same decree against Bungshee. And Jeebun, we find, did not take any steps to assert his right to a share in this property. He allowed the property to be sold as the exclusive property of Bungshee, and it was purchased by the mortgagee, Nadyar Chand, in the year 1867. The plaintiffs remained silent until September 1871, when this suit was brought.

We also find that, although by the decree of 1863, it was declared that the uncles of the plaintiffs were entitled to a certain share in this property, they never asserted their right as against the present defendants after their purchase in the year 1861.

All those facts reasonably lead to the conclusion that, notwithstanding the decree of 1863, all the members of the family agreed to treat this property, Chakdoba, as the exclusive property of Bungshee.

It has been said that, in the kistbundee, Jeebun Mundul alone was a party, and therefore anything done by him would not affect the other plaintiff, Anunto Mundul.

But we find that Jeebun and Anunto, who were two uterine brothers, were living in commensality, and Jeebun was the elder of the two; and in the petition, which was made by Jeebun in the year 1867, asking the Court to release certain property, he stated that the debt was the joint debt of the two brothers, and that they raised the money, by which he paid up the debt due to Nadyar Chand, by sale of a certain property. And then also the kobala, which was executed by the two brothers in order to raise this money has been filed, and that kobala shows that the statement of Jeebun that the debt was due from the brothers, and that Jeebun was acting on behalf of his other brother, was correct, because they are all recited in the document which was executed by the two brothers jointly.

For those reasons, we are of opinion that, although the plaintiffs' claim was not barred by limitation, yet it is evident from the transactions to which I have referred that the plaintiffs, along with the other members of the family, treated this property, notwithstanding the decree of 1863, as the exclusive property of Bungshee, and that they are not entitled to recover any share of it from the defendant, Nadyar Chand, who advanced originally the money upon the kistbundee referred to above.

The plaintiffs' claim is, therefore, dismissed with costs in all the Courts.

Markby, J.—I am entirely of the same opinion.

The 17th June 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Alluvial Accretion—Onus Probandi.

Case No. 58 of 1875.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 16th of January 1875.

Hurro Soonduree, wife of Brojokishore Sen Baboo, deceased, and Radha Bullubh Sen Baboo (Plaintiffs), *Appellants,*

versus

Sonaton Dass, Roop Lall Dass, and Rughoonath Dass (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Bussunto Coomar Bose* for Appellants.

Baboos Hem Chunder Banerjee, Chunder Madhub Ghose, and *Lall Mohun Dass,* for Respondents.

Appeal valued at Rs. 38,013-12 annas.

Where plaintiffs sued for a declaration of right to and for possession of various titles in certain alluvial accretions, of which defendants had obtained possession under a Magistrate's order under s. 318, Code of Criminal Procedure; and the Subordinate Judge had given a modified decree, allowing a portion of the plaintiffs' claim; and both parties appealed to the High Court, HELD that, as the defendants were already in possession under a Magistrate's order, the burden of proof on the issues which arose lay on plaintiffs, failing to sustain which they were not even entitled to the modified decree obtained in the lower Court. The case was accordingly dismissed with costs.

The points in regard to which the onus of proof lay on plaintiffs were as follow: They ought to have shown the several boundaries of the lands, the accretions to which they now claimed, and the original sites of the re-formations claimed by them; that they had remained in possession of them up to the time of their submersion; and that they had kept alive their interest in, by paying revenue for, any submerged land in which they might establish any right.

THIS was a suit for a declaration of right to, and for possession of, maliki, putnee, and howladari titles of certain lands, re-formed on the original site of, and accreted contigu to, the Mouzah Jowar Suksagar, Raj and Narikeluta. The plaintiffs alleged as the lands began to re-form, they took session of them, and that the defendants were the purchasers of the Jujira (island) raised a question of possession; and a under section 318 of the Code of Cri Procedure was instituted, and on the January 1871, the defendants were uni ordered to remain in possession, and, order of the Assistant Magistrate stands firmed, the plaintiffs have brought the pre suit, stating their cause of action to have a from the date of the order under section before referred to. The defendants, in written statement, complained that the bo aries specified in the plaint were extre vague and inaccurate, and that it was possible to know what lands were claime plaintiffs; that they had not attempted state what quantity of land appertained each separate talook; that the plaintiffs not entered in the thak-map as owners the property said to have re-formed, and they had filed no title-deeds; that they (pla iffs) admit that they have only a 13-16th of the land claimed, and that the other 3-1 shareholders have not joined in this s further that the plaintiffs' claim is barred limitation; that more than twelve years h elapsed since the formation of the Juji chur; that this chur was originally held Government and then by their ijaradar, a subsequently by the defendants by virtue purchase; that, after the formation of t chur and after possession as described abov the lands which comprised the southern por tion of the chur were diluviated by the river from time to time, and were as often re-formed; that the fact that the whole of Jowar Suksagar and portions of Narikeluta, &c., had been diluviated long before the thak was made is admitted by the plaintiffs, and that their claim for land said to be re-formed on

the original sites of these villages is barred both by the law of limitation and by justice: further that the lands have not re-formed on the sites stated by plaintiffs, nor are they accretions contiguous to the talooks named by plaintiffs, nor have the plaintiffs ever been in possession of any of these lands since their re-formation. The plaint is certainly very confused, and the information given is as meagre as it possibly could be. The Subordinate Judge has, however, found for the reasons detailed in his judgment that the plaintiffs are entitled to a small portion (about 1-12th) of the lands claimed. Against this decision both parties have appealed—the plaintiff argues that the rest of her claim should have been decreed, whereas in cross-appeal the defendants argue that the plaintiffs' claim should have been dismissed *in toto*. In appeal the points principally urged by plaintiffs were:—

1stly.—That the Subordinate Judge had committed an error in holding that there was no evidence to show that Jowar Suksagar was situated to the north of Rajnagur, and that Suksagar had lost all its identity, inasmuch as the survey-map and the chittas and the Collector's receipts, as well as the mutation-proceedings and the correspondence between the Secretary to the Government and the Revenue Officers clearly proved the identity of Suksagar.

2ndly.—That the Subordinate Judge was wrong in stating that there was no evidence to support the plaintiffs' title to her estate No. 877 in Rajnagur, since the receipt by the Collector showed this; and, further, that had the witnesses been cross-examined, they could have proved that the plaintiffs were the reversionary heirs.

3rdly.—That there was evidence to prove plaintiffs' title to chuck 63 in Mouzah Narikeluta, and to show that plaintiffs were entitled to the other eight-anna of the putnee talook in that the thakbust-map of Narikeluta and the putnee pottah granted by Bamasoondery, dated the 13th Aughran 1274, as also the putnee pottah which has been wrongly excluded, would show this, as likewise that the plaintiffs were entitled to the eight annas of the putnee talook.

Finally, it was argued that the case ought to be remanded to the Subordinate Judge, in that material evidence had not been received, and the witnesses had not been examined with reference to the plaintiffs' rights.

None of these grounds of appeal are in our opinion valid. It must be remembered that it is the plaintiffs who want to turn the defendants out of land of which they (defendants) have been put in possession under a Magistrate's order. It is, therefore, necessary for the plaintiffs to make out their title, and this they have failed to do. As regards their claim to lands situated in Jowar Suksagar, in the first place, it is admitted that Suksagar has been submerged for more than twenty years, and the plaintiffs ought to show that they have kept alive their title to the lands by the payment of Government revenue or in some other way, but they have not even shown that this estate still exists in the Collector's records.

The survey-maps referred to by the plaintiffs only show that there was a "haut" called Suksagar. The chittas produced are no evidence, and have not been properly proved, and, even if admissible, they are worthless, until the plaintiffs have shown themselves to be owners of Suksagar, or any part thereof, and this they have failed to do. Nor can the chittas be in any way identified with the lands. The receipts filed are of no weight; they do not go back beyond the re-formation of the chur. It appears to have only been after the re-appearance of land that plaintiffs paid in some very small amount of rent; in fact, they only commenced to pay rent in the year just preceding the section 318 case. The correspondence referred to is really no evidence, and does not

even show where Suksagar was, or what title the plaintiffs had in that village. Before their claim to any re-formation on the original site could hold good, the plaintiffs must have shown the several boundaries of Suksagar and how far it extended, but they have been unable to give any information on these points. As regards the estate No. 877, the reasons given by the Subordinate Judge for holding that the plaintiffs' claim fails are not shown to be incorrect; it was for the plaintiffs to prove that they were the reversionary heirs of Kashikant. As to chuck 63, this was claimed as a distinct talook held by plaintiffs as howladars, but there is no evidence of their title and possession of the land as alleged. It was argued that the Subordinate Judge should not have rejected the putnee pottah of the eight-anna share of talook No. 631 said to have been granted by Kali Mohun, and which the plaintiffs wished to tender as evidence of their title; but, as the original pottah is not before us, and as up to date the plaintiffs have never even asked to be allowed to produce it before us, we are, in the absence of the original, unable to say that the order of the Subordinate Judge was wrong. Next, as regards the lands claimed as accretions, the Subordinate Judge has found, and the evidence on the record certainly bears out this finding, that the lands accreted on the north, and that they accreted to defendants' mehal, and that, at the time of their accretion, the lands to the south, which are said to have re-formed on the original site of plaintiffs' villages, were still submerged. Hence, whatever claim the plaintiffs may have to lands said to have re-formed on the original sites, they are clearly not entitled to the lands claimed as having accreted contiguous to the plaintiffs' villages. Lastly, as to the small portion of the plaintiffs' claim that has been decreed by the Subordinate Judge as being lands found to have re-formed on original sites, we hold that the evide adduced by plaintiffs is insufficient to w rant our confirming the decision. In the f place, the plaintiffs have not shown s factorily the original sites of these sev chucks or their title to the same; and, secon ly, they have failed to prove that, at the ti of the thak, they were actually in possess of the lands comprising these chucks, a that they remained in possession of th up to the time of diluvion—the said th having taken place in 1859-60, or m than fourteen years prior to the institut of their suits. The evidence of the w nesses who speak to possession is very vag and, in our opinion, unreliable; furth these chucks did not form an entire vill but were scattered here and there over village of Rajnagur and Narikeluta; and t way in which the Ameen has ascertai their original sites is unsatisfactory, espe ally when we examined the maps on whi he principally relied. The plaintiffs in th case have filed two attested copies of th thak-map of Rajnagur, No. 5620—one fil on the 16th January 1874 along with th list, the other on the 26th August 1876 The chucks claimed by plaintiffs are number differently in the schedule of these tw maps. Now, had the plaintiff honestly com forward and informed the Subordinate Judg that there was a mistake in the copy fir filed, and attempted to show that th second copy was the correct one, it migh have been necessary to consider the matter but the plaintiffs, when filing the secon copy in Court, merely stated that they had done so, because it was clearer and fuller, they never mentioned that there was any alteration in the maps or in the schedule. Under these circumstances, and after taking all the facts of the case into consideration, we have no hesitation in setting aside that portion of the lower Court's order by which a portion of the plaintiffs' claim was decreed.

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appeal is, therefore, dismissed, and the appeal decreed, the plaintiffs' suit dismissed with all costs.

The 19th June 1876.

Present:

The Hon'ble F. A. B. Glover and W. Ainslie, *Judges.*

Fractional Share—Mesne-profits.

Case No. 87 of 1876.

ellaneous Special Appeal from an der passed by the Officiating Judge of llah Jessore, dated the 28th of nuary 1876, affirming an order of Sudder Moonsiff of that District, ted the 31st August 1875.

ruf Kahee and others (Decree-holders), *Appellants,*

versus

Moniruddi Sheikh (Judgment-debtor), *Respondent.*

aboo Bungshidhur Sen for Appellants.

aboo Joygobind Shome for Respondent.

Where a decree-holder was put in possession of certain quantity of land within four jummas, and ght to recover mesne-profits for the period during ch he was kept out of possession, but was met by objection that his decree was for a fractional portion the whole four jummas, but did not specify the parti-r plot or plots of land from which his interest was be paid, and he set against this objection the rejoinder that the first Court had given a decree for a certain extent of land which corresponded with the extent of his share, and that he was entitled to recover mesne-profits in proportion to that share from the whole four jummas, HELD that, if the intention of the first Court in giving plaintiff a decree for a certain extent of land had been to give him a decree for a proportionate share in the four jummas, he would have got it, but that, as such an intention was not clear, he was not entitled to a decree.

Glover, J.—THE plaintiff, now the decree-holder, brought this suit to recover possession of a certain share in four specified jummas, and he got a decree for a certain quantity of land in three of these four jummas, and is said to have got possession. The present suit is for mesne-profits accruing on that land during the period he was out of possession. The Judge has come to the conclusion that the decree which the plaintiff has obtained is incapable of execution, inasmuch as it is drawn out in a vague and uncertain manner, and he would define the land on which wassilat is to be assessed. The plaintiff in the original suit asked for a 4½-annas share in certain undivided properties situated in four jummas; and the decree that was given, and which has been read to us, was, that he was to get 1 beegha 1 cottah and 10 chuttacks of land in three of these four jummas. Now, it is quite clear that from the terms of the decree there was no means of ascertaining from what particular jumma the plaintiff was to get the land, whether from the first or the second, or the third; and it was, therefore, impossible to execute the decree as it was made. But it is said by the special appellants that, although the decree was not properly worded, the meaning of the whole order of the Moonsiff was, that he, plaintiff, was to get a 4½-annas share in the three jummas, and that, inasmuch as that 4½-annas share would amount in land to 1 beegha 1 cottah and 10 chuttacks, that quantity was properly included in the decree as the

quantity of land which he was to get; and that the real meaning of the order was, that he was to get a share in the three jummas, the aggregate of which would amount to 1 beegha 1 cottah and 10 chuttacks. Now, if we could understand from the order of the Court below that this was the intention of the Moonsiff, we should of course have given effect to the decree, however obscurely it may have been worded, and allowed plaintiff to recover the land to which he was undoubtedly entitled. But there is nothing in the Moonsiff's order which would lead us to the supposition that such was his intention. The schedule that has been read to us by the special appellant's pleader is no part of the decree, nor does it form part of the Moonsiff's decision.

It is said that in the original suit for possession the first Court construed its own decree in the manner now stated by the special appellant's pleader, and that possession was given of a share, and not of a specified quantity of land. We find nothing on the record to support this contention. There is simply an order directing the Nazir to give possession according to the terms of the decree and the return of the Nazir giving possession, but there is nothing in the Moonsiff's order to show what that share was of which possession was to be given, and there is consequently no explanation of the decree by the Moonsiff as is contended. The Judge has found that, in consequence of the vague and uncertain way in which the decree was drawn up, it is impossible to say in which particular plot of land this 1 beegha 1 cottah and 10 chuttacks is situate, and that, therefore, the subsequent decree for mesne-profits is equally vague, and cannot be carried out. We think the Judge is right, and that this appeal must be dismissed with costs—one gold mohur.

The 20th June 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Suit for Possession—Deed of Sale—Consideration—Plea of Ignorance—Benamee Transaction.

Case No. 145 of 1874.

Regular Appeal from a decision passed by the First Subordinate Judge of Bhagulpore, dated the 5th of March 1874.

Musst. Ranee Ruheemun *alias* Baha[illegible] Shah Iradut Hossain, and Syed Yar [illegible] as guardian of Yoosoof Ali (some of [illegible] Defendants), Appellants,

versus

Sahoo Ram Proshaud Doss (Plaintiff), Respondent.

Mr. Gregory, Moonshee Mahomed Yu[illegible] and *Baboo Chunder Madhub Ghose* [illegible] Appellants.

The Advocate-General, Mr. Woodro[illegible] and *Baboos Mohesh Chunder Chow[illegible]* and *Rajendro Nath Bose* for Respondent.

Where a Rajah, on establishing his right as heir [illegible] his step-sister's estate, had granted a mokurruree lease of it to the Ranee, his wife, and a suit was brought for recovery of possession of this estate by a person to whom the Ranee was said to have conveyed it under a kobala, and this claimant proved payment of the consideration, either directly, or in diversion to debts and other charges on the estate, but the Ranee, *firstly*, repudiated the whole transaction, and charged her agents with fraud, and, *secondly*, claimed exemption from the obligation of the deed of sale on the plea of ignorance of its contents, and, *thirdly*, pleaded that the mokurruree lease was a mere benamee transaction, FOUND that there was no proof, either of fraud on the part of the Ranee's agents, or of real ignorance on her own part, or of any such loss to the Ranee, or of any such irregularity on the part of her agents as would impart any weight to her plea of ignorance; and HELD that, under

the circumstances, though it would be difficult to prove on the evidence produced that the mokurruree lease was a genuine transaction, the point was immaterial to the plaintiff's claim, which was accordingly decreed.

THIS suit was brought by the respondent to recover possession of 3½ annas of Pergunnah Kujra, and 6 annas of six talooks appertaining to Tuppa Belpatta (called the "ghats") with mesne-profits.

The title of the respondent is based upon a kobala, dated 10th March 1872, purporting to be executed by the Rajah Hossein Bux and his wife, the appellant, Ranee Ruheemun. By this kobala, 4 annas of the zemindary right in Kujra and 14 annas of the zemindary right in the ghats are conveyed to the respondent by the Rajah, and 3½ annas of the mokurruree right in Kujra and 6 annas of the mokurruree right in the ghats are conveyed to the respondent by the Ranee. The whole being sold for a lump sum of Rs. 1,20,000.

It appears that the Rajah had, after considerable litigation, established his right as heir to his step-sister, Maharanee Wazirunnissa. Her estate was liable to considerable debts. Immediately upon recovering the property, the Rajah granted a mokurruree lease of it to his wife for a consideration of Rs. 4,000 at the rent of Rs. 301. This lease is dated 27th January 1869.

Besides the debts chargeable on the estate, the Rajah and Ranee appear to have borrowed considerable sums of money on their own account, and, towards the end of the year 1871, were much embarrassed. Decrees had been obtained against them, and the property in dispute had been attached. It is proved by the evidence that, between November 1871 and March 1872, attempts were being made to sell the property in dispute. Negotiations were opened with the respondent and with the Court of Wards, and frequent short postponements of the proceedings in execution were obtained in order to enable the Rajah and the Ranee-appellant, to dispose of the property privately. The last postponement but one was to the 4th of March 1872, on which date the property stood advertized for sale. On the 1st of March, an application was filed by the Rajah and the Ranee-appellant, stating that the negotiation with the Court of Wards having been broken off, an arrangement had been made for the sale of 1½ annas of the mokurruree right in Kujra and the ghats to the respondent for Rs. 60,000, and of 4 annas of the zemindary right in Kujra and of 6 annas of the zemindary right in the ghats to one Misri Laul for Rs. 7,000. The sale in execution was accordingly postponed to the 18th of March, and in the mean time the sale of the 10th March was concluded.

The kobala recites the decrees for which the property was about to be sold in execution amounting to Rs. 17,800; it also recites bond-debts due to the respondent amounting to Rs. 57,010-15, and recites the receipt of the balance of the consideration, Rs. 62,989, after deducting the respondent's debt, to have been paid to the vendors. In fact, however, that sum of money was not paid as there recited. Decrees were paid off, and other payments were made on account of the vendors as stated in the schedule to the kobala, and the balance Rs. 30,770-10-0 was paid over on the 10th April 1872 in 29 notes of Rs. 1,000, four of Rs. 500 each and cash.

The principal party who conducted these negotiations on behalf of the vendors was Reaz Ally. He is admitted to have been the am-mookhtear of the Ranee-appellant, and a copy of his mookhtearnama, which we have no doubt whatever is correct, has been filed. Under this he is expressly empowered to sell the Ranee's property. The Rajah appears to have acted personally to some extent in the matter, and one Ijabutullah,

whom the Ranee-appellant puts forward as a trusted agent on her behalf, also took part in the negotiations, but Ijabutullah acted, as he himself states, under the directions of Reaz Ally. There is no allegation of undue pressure or other improper conduct on the part of the respondent or any other person prior to the 1st of March 1872. It is also admitted that the debts and decrees were due and were properly liquidated out of the consideration-money, and the balance paid over into the hands of Reaz Ally.

The deed of sale purports to be sealed and signed by the Rajah, and to be sealed by the Ranee-appellant. It is also signed "Ranee Ruheemun *alias* Baharun, by the pen of Sheik Reaz Ally, am-mookhtear, under the power dated the 1st September 1870." It was presented for registration on the 11th of March. It bears a recital signed by Kubiludin Ahmed, a mohurir in the Registry Office, that he went on the 12th of March to Kujra to take the Ranee's acknowledgment of the deed, and that she did acknowledge it and affixed her mark thereto, she being identified by one Futteh Ally, whom the witnesses for the respondent allege to be her physician.

The Rajah put in no written statement, and took no steps to defend the suit. The appellants, other than the Ranee, are persons who have purchased portions of the property from her since this dispute arose, and they rely on the defence set up by her. The case set up by the Ranee-appellant is contained in the 9th, 10th, 11th, 12th, and the 13th paragraphs of her written statement. Her allegations are in substance as follow:—

(*a*.) That she never executed the deed, never acknowledged it before the Registry Officer, and was not at Kujra at the time when the deed purports to have been executed by her.

(*b*.) That she did not, by the mookhtearnama of September 1870, empower R Ally to sign for her.

(*c*.) That Ijabutullah and Reaz Ally w specially appointed to negotiate the sale 3½ annas of Kujra only to the Court Wards.

(*d*.) That Ijabutullah had agreed w the Court of Wards for the sale of the p perty at the price of Rs. 2,58,000, a that she sent the Rajah with her seal execute an ikrarnama for the sale of property on these terms.

(*e*.) That, by the collusion of the plaint her husband and Reaz Ally, the prop was sold to the respondent at a lo price.

(*f*.) That Reaz Ally had no authority file the applications relating to the postpo ments of the sale in execution, and to sale to the respondent.

(*g*.) That the debt alleged to be due to respondent was not really due.

(*h*.) That Reaz Ally was not her gene agent.

(*i*.) That she does not know Futteh Al

All these allegations may now be taken be disproved, except those contained in paragraphs (*a*), (*e*), and (*i*); and, if we are believe that the Ranee knows anythi whatsoever about this suit, and is anythi more than a mere puppet in the hands others in this litigation, we are compell to say that some of her statements are w fully false.

It is also to be observed that the stat ment which she now puts forward diffe very materially from that which she put forward when she made her first complaint In the petition, dated the 2nd July 1872, she says that she has been informed by a letter of Ijabutullah that, in his absence, Reaz Ally and her husband had been imposed upon by the respondent, whereupon she dismissed Reaz Ally, and took the seal away from her husband. No charge of fraud was made

Reaz Ally or her husband at this Nor is the charge of fraud, now t by the Ranee-appellant against Reaz nd her husband, supported by any ce. On the contrary, as against Reaz t is, as it appears to us, completely ed by the evidence of Ijabutullah. witness represents himself as having acted under the orders of Reaz Ally, hom he is still on intimate terms, and even been assisted by Reaz Ally in g up the Ranee's written statement very case. In fact he does not state eaz Ally has, up to this date, been sed by the Ranee; whilst the respon- witnesses state that Reaz Ally is still service. The charge of fraud against Ally, therefore, entirely fails; that the Rajah has not been seriously ined.

statement that the Ranee does not Futteh Ally is also evidently untrue. inted out by the Subordinate Judge, n witnesses do not bear out this state- Though Futteh Ally himself denies identified the Ranee on the occasion tion, and that he is her physician, he that he has studied medicine, whilst ertion that he carries on another busi- hat of a dealer in hides, is unworthy it. He admits that he was acquaint- the Registry Mohurrir Kubiluddin; ere can be no doubt whatever that he o Kujra for the purpose of identify- e Ranee; there is also no reasonable that he was acquainted with her.

case then of the Ranee being in all particulars untrue, are we to believe hen she denies that she executed the ? Upon this point, no doubt, there is siderable conflict of evidence. The ses for the respondent say that she at Kujra in November, and remain- re until March. Her witnesses deny e left Auti at all at that time. The Subordinate Judge has believed the witnesses for the respondent, and it seems to us impossible to say that he was wrong in doing so. No reasonable suspicion can attach to the deposition of the Registry Mohurrir Kubiluddin, and the only possible explanation of his statement is that he was himself deceived. But there appears to us to be nothing whatsoever to support such a suggestion as this. If it had been clearly made out that Reaz Ally had joined in a plot with the respondent and the Ranee's husband to defraud his mistress, this suggestion might have been at least plausible that some one was got to personate the Ranee. But, as we have pointed out, this evidence, as far as it goes, contradicts the assertion that Reaz Ally has entered into any plot against the Ranee.

Upon the whole, therefore, we have no hesitation in concurring in the finding of the Subordinate Judge that the Ranee executed the kobala.

It was contended that, even if the Ranee did execute this instrument, that it was not properly explained to her, and ought not to bind her. No point of this kind seems to have been made in the Court below, and we think there is no ground upon which we could say that, if she executed the deed, she is not bound by it. She admits that she knew that her property was going to be sold, and there was in fact no possibility of avoiding a sale. The transaction had the full approval of her husband, and of her own am-mookhtear who was present when she executed the document. She asserts that it was a sale very detrimental to her interests, but that is not made out. As far as we can discover, the price was certainly as good as she would be likely to have got had the property been put up to auction. We think the evidence shows that Reaz Ally got the best price that was obtainable for the property. The Ranee did, at one time, assert that Reaz Ally and her husband had been over-

reached by the respondent in this transaction, but that assertion has been entirely abandoned.

In this view of the case, it becomes immaterial, to determine whether the mokurruree lease to the Ranee was a benamee transaction or no. Whether it was so or not, the respondent is entitled to his decree. It would, however, be extremely difficult to hold that it was a real transaction in the face of the evidence of Jebun Lall, who was called as a witness on behalf of the appellant. No doubt this witness disappointed the expectations of those who called him, and probably his statements took them by surprise. But the rest of the evidence in support of the transaction is very weak, and, taking place when it did, it looks very like an attempt to shield the Rajah's recently-acquired property from his creditors. It is true that the respondent dealt with both the Rajah and the Ranee distinctly upon the terms that the alleged mokurruree grant was a real transaction, but, of course, it is possible that he was himself deceived.

We do not, however, think it necessary to discuss this question further. Assuming the property to belong to the Ranee to the extent alleged by her, we find that she conveyed her interest to the respondent, and we dismiss this appeal with costs, for which costs Ranee Ruheemnn, Shah Iradut Hossain, and Mir Yar Ali are liable. The infant Syed Yoosooff Ali cannot be made liable for any thing in this litigation.

The 22nd June 1876.

Present:

The Hon'ble F. A. B. Glover and W. Ai

Judges.

Contract—Variance—Adjustment of Acco

Case No. 119 of 1875.

Regular Appeal from a decision passe the Judge of Zillah Hooghly, dated 2nd of April 1874.

Oopender Narain Mookerjee (Defenda

Appellant,

versus

Gudadhur Dey and another (Plaintiff

Respondents.

Baboo Taruck Nath Sen for Appellant.

Baboo Bycunt Nath Paul for Respond

Where an estate was sold under a contract at tw a-half years' purchase of the net annual rent-collec and various sums of money were left in deposit the vendee to meet various charges which were exp to arise, and the amount of these charges was regu by the vendor's expectations, and formed portions stipulations of which the contract was composed the net annual collections eventually fell short of expectations, HELD that the agreement at the the contract, *viz.*, that the property was taken years' purchase, should govern the whole transac and that the accounts between the parties should adjusted accordingly.

THE plaintiffs in this case, Gudadhur D and Mussamut Sabitri Soondree Dassee, s to the defendant, Nobokisto Mookerjee, cert shares in mokurruree mourosee ijaras b longing to them for an aggregate sum Rs. 13,951. The first deed of sale w executed on the 29th Aghun 1274 B. the second on the 3rd Pous of the same yea A few days later, *i. e.*, on the 21st of th month, the contracting parties entered int an arrangement regarding the payment o the purchase-money which was duly em bodied in a nyampattra.

By the terms of this deed, the balance o the purchase-money, which is stated thereb to be Rs. 9,927 (Rs. 4,024 having bee

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apparently paid in cash at the time the kobalas were given) was to remain as it were in suspense account until certain adjustments of rents due to the zemindars, and certain inquiries into rents received and profits expected were brought to a conclusion. Thus Rs. 2,027 were allowed to represent the back rents of 1274 B. S., which the vendors had collected, but which the vendee was entitled to, his interest commencing from the beginning of the year.

Rupees 3,000 were left in the vendee's hands for the purpose of being paid by him on account of rent due by the vendors to the superior landlord. Similarly Rs. 2,900 were left as rent due for the year 1273 B. S. to other co-sharers in the zemindaree.

And Rs. 2,000 were allowed to be retained in deposit until the amount of the "hastabood" of the share sold under the second kobala was inquired into and determined. The arrangement regarding this deposit was, that, if the hastabood proved to be less than Rs. 1,043 (the amount stated by the vendors), the purchase-money of the whole property should be diminished in proportion. This purchase-money was calculated at 10½ years net profit, and was to be diminished at the same rate if the hastabood was less than the sum alleged by the vendors. There was also a stipulation that the price of the estate should be increased in the same proportion if the hastabood showed a larger yearly net profit than Rs. 1,040.

The Judge found that, over and above the Rs. 4,024, the defendant had paid on account of his purchase Rs. 4,036-7-9 to landlord shareholders of the estate as rent for the year 1273 B. S., and allowed that sum to be deducted from the Rs. 5,900 held on this account in deposit by the defendant. He disallowed the item of Rs. 2,333-4 which the defendant claimed as having been paid by him on account of Rughoo Mohinee's default, and on this part of the case found that the plaintiff was entitled to recover the difference between Rs. 4,036-7-9 and Rs. 5,900, or Rs. 1,863-8-3.

With regard to the portion of the rents for 1274 B. S., which the plaintiffs admitted they had collected, the Judge gave them the difference between the amount proved to have been collected, *viz.*, Rs. 1,496-14-3, and the sum in deposit on that account, *viz.*, Rs. 2,027, and Rs. 530-1-9.

With regard to the hastabood, the Judge found on the evidence that the net profit of the estate was not more than Rs. 378, and he therefore considered that the plaintiff had forfeited the Rs. 2,000 deposited with the defendant on this account.

The defendant only appeals against the Judge's order, and Baboo Mohinee Mohun Roy on his behalf is willing to waive all objections to the Judge's figures, and to take the account and liabilities as stated by him. His (Mohinee Mohun Roy's) objection is, tha if the purchase-money of the second property be calculated at the rate agreed on between the parties, and as found by the Judge, *viz.*, at 10½ years' net rental, then it is shown by the Judge's own figures that the defendant has paid more than was required of him on the whole purchase account, and that the plaintiffs' suit must fail.

The plaintiff, be it observed, has not appealed (he did so in the first instance, but afterwards withdrew his petition), so that we must, as the defendant makes no objection to the Judge's figures, take those figures as correct. It appears from them that wha the plaintiffs had to pay was

Rs. 3,000 on the 1st kobala,

and Rs. 3,969 on the 2nd, this being 10½ years' value of the net rental, Rs. 378, as found by the Judge, instead of Rs. 1,043 as declared by the plaintiffs, or, in all, Rs. 6,969.

The defendant has been found to have paid

in cash	Rs. 4,024
on rent due by the plaintiffs to co-sharer landlords for 1273 B. S.	„ 4,036-7

and to have been improperly deprived of Rs. 1,496-14 rent collected by the plaintiffs during the year 1274 B. S., after they had given up their right to make collections.

Or, in all, Rs. 9,557-5, so that the balance is very considerably in favour of the defendant. The mistake made by the Judge, as it seems to me, has been, in taking the Rs. 2,000, deposited on account of the hastabood, as the measure of the plaintiffs' liability, whatever the net rental of the estate might turn out to be. The agreement between the parties was, that the purchase-money was to be 10½ times the yearly net rental, and there was no provision that, if the rental was found to be so much less than the amount stated by the vendors that the 2,000 rupees would not cover the loss, the vendee should bear the consequences. On the contrary, the arrangement was that in proportion as the net rental exceeded or was less than Rs. 1,043, the vendee should pay or receive the difference at the rate of ten and a half.

The amount of deficit calculated at 10½ years' rental would be Rs. 6,982 instead of the Rs. 2,000, for which the Judge has given the defendant credit.

Without going further, therefore, into the account, or deciding whether the minor items of collection-charges or of bhagat lands have been correctly ascertained or not, I think it quite clear on the lower Court's own calculation that the plaintiffs have nothing to receive from the defendant, and that their claim ought to have been dismissed.

The result is, that the appeal must be allowed, and the decree of the Court below reversed with costs, and in lieu thereof the plaintiffs' suit must be dismissed.

The 22nd June 1876.

Present:

The Hon'ble F. A. B. Glover and W. Ainslie, *Judges.*

Maintenance—Widowed Step-mother—Pr tion of Maintenance Charge to Income— gradation of Widow, Ceremonial not L Condition—Ill-treatment a ground for S ration.

Case No. 176 of 1875.

Regular Appeal from a decision passed the Subordinate Judge of Zillah D dated the 25th May 1875.

Hurry Mohun Roy (Defendant), *Appell*

versus

Sreemutty Nyantara (Plaintiff), *Respon*

Baboos Mohiny Mohun Roy, Hem Chu Banerjee, and *Probodh Chunder* for Appellant.

Baboos Bosunt Coomar Bose and *Byc Nath Dass* for Respondent.

Where a widow sued her step-son for a sep maintenance on the ground of his ill-treatment, the Subordinate Judge, in the absence of evide the contrary, accepted the defendant's incom returns as a proof of the amount of his income, gave the plaintiff an allowance of 7 per cent. on income, but qualified it with a proviso that pla should forfeit some portion of it if she refused accept accommodation which defendant provided her, HELD that the ill-treatment being proved, what Court had to do was to provide a reasonable maint ance; that the lower Court was right in accep the income-tax return as evidence of the amount defendant's income, but that 7 per cent. on that inc was too heavy a charge for the maintenance of a sin member of the family; and that a monthly charge Rs. 25 on an income of Rs. 7,000 a year (or 4·28 p cent.) would be a reasonable charge.

HELD, also, that, in an inquiry of this kind, any sav ings which a woman might make by living with her own family should not be taken into account; and that the degradation in which a Hindoo widow is expected to live is a matter of ceremonial observance rather than of law.

THIS was a suit by a step-mother against her step-son to recover maintenance at the rate of Rs. 75 per mensem together with

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payments at that rate for five months. cause of action is stated to be contin- ill-treatment on the part of her step- which has obliged her to leave his house o seek accommodation elsewhere.

e defendant denied the ill-treatment, lleged that the maintenance demanded e plaintiff was exorbitant, and that his me was altogether unable to afford such llowance. He further pleaded that the tiff was not entitled to maintenance at m him.

e Subordinate Judge found that the iff had been ill-treated by her step-son, was justified in leaving his house and de- ling maintenance from him from the date leaving. He also found that the defend- income was not less than Rs. 7,000 y, and that he could afford to pay Rs. 30 onth to the plaintiff, together with an Rs. 10 a month, should he not furnish with proper accommodation in one of houses at Dacca. He added to his decree oviso that, if the plaintiff insisted on g at her father's, or at her son-in-law's e against the will of the defendant, she ld forfeit the larger portion of her ance and receive Rs. 12 a month only.

oth parties are dissatisfied with this r. The defendant has appealed regu- y, the plaintiff has preferred objections er section 348, C. C. P.

And first as to the defendant's appeal. oo Mohiny Mohun Roy on his behalf s not desire to contend that, if ill-treat- nt on the part of the defendant is oved, the plaintiff will not be entitled to aintenance. He admits that she is entitled maintenance, and the only question raised y him is to the amount decreed by the Subordinate Judge.

It is admitted on all hands that the ill- eling between the parties to this suit is o strong that it would be impossible for hem to live in the same house, so that any allowance that is to be made must be calculated without reference to the possibility of plaintiff's getting accommodation anywhere on the defendant's premises.

On behalf of the defendant, appellant, it is urged that he has himself come forward and testified on oath that his income does not exceed Rs. 4,200 annually, but this is not exactly the case. No doubt the defendant in his deposition does say that his zemindaree net income is Rs. 4,200, but he does not say (and under the circumstances his silence is remarkable, if not suspicious) that he has no other source of income, whereas there is a considerable amount of evidence to the effect that besides his zemindaree the defendant has Government Promissory Notes, and a banking business likewise. But, apart from this evidence, there is the income tax return furnished by the defendant himself, in which he states his income as Rs. 7,000. It is not to be supposed that he returned a larger amount than he really received, and we think that the Subordinate Judge was quite justified (in the absence of anything like explanation on the part of the defendant) in assessing the defendant's present income at not less than this sum.

But granting this, it does not, we consider, follow that an allowance of Rs. 30 monthly plus Rs. 10 for house-rent, or in all Rs. 40, is a reasonable one. Rs. 480 a year is nearly 7 per cent. of the defendant's annual income, and that seems to us too large a proportion to take away for the maintenance of one member of the family only. After considering all the circumstances of the case, as well as the reasonable and probable needs of a person in the plaintiff's position in life, we come to the conclusion that a monthly allowance (including everything) of Rs. 25 is as much as the defendant can afford, and as much as the plaintiff is entitled to expect. But this allowance must be given unreservedly, it is in the highest degree improbable, consider-

ing the terms on which the parties to this suit are, that the defendant could ever agree to his step-mother's living either with her father or with her son-in-law, especially when her determination to live with either of those relatives contrary to the defendant's wishes would have the effect of saving him half the allowance he is now obliged to pay. To uphold the stipulation mentioned in the Subordinate Judge's decree would be practically to cut down the plaintiff's allowance to Rs. 12 per mensem, for a widow woman would naturally desire to live with her relatives, and not amongst strangers. As to the objection, that by her living with her relatives, the expense of a cook, &c., would be saved, and that the defendant is entitled to the benefit of such saving, we do not think that the circumstance ought to be taken into account in the case. What we have to do is to give the plaintiff a reasonable allowance for maintenance, her position and that of her step-son being considered, and we do not think that Rs. 25 a month is too large a one, even if some small item of expense be cut off by the plaintiff's living in her father's or son-in-law's house. As to the life of semi-starvation and wretchedness, in which it is argued that according to the Shastras a Hindoo widow ought to live, that is a matter of religious or ceremonial observance rather than of law. A Hindoo widow is in these days at all events entitled to decent food and clothing if the head of the family is in a position to supply them, and Rs. 25 a month does not seem too large a sum for the purpose.

The Subordinate Judge's decree will be amended accordingly. The plaintiff will have a decree for Rs. 25 monthly as maintenance-allowance, together with back payments at that rate. Under the circumstances each party will bear his own costs in this appeal.

The 22nd June 1876.

Present:

The Hon'ble F. A. B. Glover and W. Ainslie, *Judges.*

Contract—Adjustment of Accounts—Limit

Case No. 255 of 1875.

Regular Appeal from a decision passed by the Officiating Judge of Zillah Hooghly dated the 25th May 1875.

Opender Narain Mookerjee (Plaintiff), *Appellant,*

versus

Gudadhur Dey and another (Defendants), *Respondents.*

Baboos Taruck Nath Sein and *Bhoy Chunder Banerjee* for Appellant.

Baboo Bycant Nath Paul for Respondents.

In a suit to have an account taken of what was payable, and had been paid, by either of two parties in pursuance of a contract, and to have a decree for the balance found to be due to either—the contract distinctly providing for an adjustment after the net annual collection, and containing a stipulation that any loss accruing to the interests of one party by any lachesse in payment of rent by the other should form a ground for compensation, HELD that it was not necessary that the land should be sold up for arrears in default of payment before the account could be adjusted; and that even a decree, taken out by the zemindar against defendant for the rents of the land in suit, did not affect plaintiff's claim to the money owing under the contract.

Article 95, Schedule II. of the Limitation Law, provides a period of limitation in extension of the period which, in the absence of fraudulent concealment, would, under some other article, apply to a suit, and not a period less than that which, under ordinary circumstances, would be allowed for a suit of the same nature.

THE parties in this appeal are the same as in No. 119, but their relative positions are reversed. Nobokishen, who was defendant in the first suit, is plaintiff in the present suit. The former suit was instituted on 18th December 1872, and decided on 2nd April 1874. This commenced on 5th January 1874, and terminated on 25th May 1875. Both suits are to recover money said to be

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under one and the same registered *pattra*, or agreement, of the 21st Pous

The present suit is, in the reading of laint, called a suit for breach of con- but looking to the matter that follows, not in reality a suit for damages for a h of contract, but a suit to have an nt taken of what has been payable and by either party in pursuance of that act, and a decree made for any balance d due to the plaintiff.

he Judge has come to the conclusion this is a suit falling within the provisions rt. 95 of Schedule II. of the Limitation but he has overlooked section 19 of Act. The 95th article provides a period limitation *in extension* of the period h, in the absence of fraudulent conceal- t, would, under some other article, apply suit, and not a period less than what, er ordinary circumstances, is allowed for ging a suit of the same nature. The ntiff is not claiming relief under Art. 95 his right has become barred under e other provision of the Statute, and it is ether a mistake to apply to the pre- ice of a plaintiff that which was meant avour him.

The suit is clearly a suit on a contract in ting registered, and if it does not come der Art. 117, which perhaps it does not, s governed either by Art. 113 or by Art. 8, and as the same period of limitation is scribed in either case, it is needless to scuss the matter further.

The appellant (plaintiff) has, at the hearing the appeal, abandoned the greater part of is claim, and is content to stand by the udgment in the first suit, by which he is, s he contends, entitled to the sum of Rs. 2,588-5-0 paid by him as the result of his purchase of the properties conveyed in the deeds of 29th Aghun and 3rd Pous 1274, modified by the *nyampattra* of 21st Pous 1274, over and above the amount to which the defendant is entitled, and he claims this sum under the covenants contained in the *nyampattra*.

The defendant, respondent, seeks to re-open the account, but he is not at liberty to do this. Although in the two suits the parties claim what may be termed different remedies, so far that the right to the remedy sought in each suit cannot co-exist, the question to be decided in both suits is the same, namely, how the account between the parties stands. The several items of the account were ascertained by the Judge in the first suit, and though the present defendant lodged an appeal, he withdrew it, and must be taken to have accepted the figures as correct. There are no items of later date introduced in this suit as it comes before us on appeal, and consequently the balance found in either suit in favour of the plaintiff then (defendant) is conclusive in this suit.

The substantial defence in this suit is that *nyampattra* does not give the plaintiff any claim to a refund, and that supposing it does support his claim, still as regards an item of Rs. 1,496, being the amount of rents collected by the vendors in 1274, the plaintiff is not equitably entitled to charge this to the defendant, inasmuch as he has failed to satisfy the zemindar's claim for rent for 1274, and a decree has, in consequence, been made against the defendant for those rents.

The first point has been virtually decided in appeal No. 119, and it is only necessary to say that the agreement of 21st Pous 1274 does provide, in distinct terms, for an adjustment of accounts between the parties after the *hustabood*, or net annual collections, have been ascertained. The words are: "You shall have to pay up to me the amount which will be due to me in addition to Rs. 2,000 in the event of the profit turning out to be less (than Rs. 1,043 per annum) on an enquiry in the mofussil;" and in a

previous passage, "If more than Rs. 2,900 be due on account of the said rent, you should pay it. If you do not pay it, and my mokurruree right suffers any injury, you shall have to pay me compensation for it." It was contended that so long as the tenure is not actually sold for realization of arrears of rent, this covenant remains in abeyance, but this is an unreasonable construction. It cannot have been the intention of the parties that, if the purchaser of the mokurruree should be forced to pay arrears of rent to the zemindar over and above what the seller had disclosed, in order to protect his tenure, he should have no remedy under the agreement, but that if he did not so protect the tenure, he should be entitled to compensation under it.

With respect to the sum of Rs. 1,496, the right of the plaintiff under the terms of the agreement is beyond question; the equity of the defendant has not arisen; he has admittedly not paid a farthing of the rents of 1274 up to this date; he cannot demand a set-off for a claim which may arise in the future; if he wished to have a final settlement of accounts in this suit, he could have secured it; he has not done so, and we must take matters as they now stand, and not as they may or may not be at some uncertain future date.

It was urged that the *nyampattra* is insufficiently stamped; its genuineness is unquestioned; it was brought into Court in the first suit by the defendant himself, and we cannot, in appeal, give effect to an objection which does not affect the merits.

The appeal is allowed, and the decree of the Court below is reversed; and in lieu thereof we decree that the plaintiff is entitled to recover from the defendant the sum of Rs. 2,588-5-0, with interest at 6 per cent per annum from date of the first Court's decree, with proportionate costs.

The 22nd June 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Contract—Concerted Litigation—Costs Litigation—Direction of Litigation—Appeal to Privy Council.

Case No. 1281 of 1875.

Special Appeal from a decision passed by the Officiating Judge of Zillah Bakarganj, dated the 31st of March 1875, affirming a decree of the Subordinate Judge of that District, dated the 1st of July 1873.

Shushee Mohun Shaha Chowdhry and another (Plaintiffs), *Appellants,*

versus

Tara Purshad Mojoomdar and another (Defendants), *Respondents.*

Baboo Sreenath Dass for Appellants.

Baboos Opendro Chunder Bose and *Sreenath Banerjee* for Respondents.

Plaintiffs having sought to recover from defendants their share of the costs of certain litigation which plaintiffs had set agoing at the instance of defendant's father, who was jointly interested with plaintiffs in certain property in suit, but who wanted the means to prosecute the litigation for its recovery, and who, accordingly, executed an ikrarnama agreeing to share the costs of the necessary litigation proportionately with plaintiffs, provided they furnished the funds for prosecuting that litigation to the furthest limits; and the said litigation having terminated adversely to the interests of both plaintiffs and defendants, without any appeal having been preferred to the Privy Council; and defendants having repudiated all responsibility for costs on the

ground of default in prosecution of litigation to the furthest possible limit, HELD that, as plaintiffs had merely undertaken to furnish the means for carrying on the litigation, but had not actually undertaken the conduct of that litigation, and as it was not in evidence that defendants had wished to go up to the Privy Council, and to this end had made a demand on, but had been frustrated by plaintiffs, the plaintiffs were entitled to recover proportionate costs in the concerted litigation, with costs in the present suit proportioned to the amount thus obtained by them.

The lower Courts in this case found that it had not been proved, either that the pleaders had advised, or that defendants' father had agreed, that there should be an appeal to the Privy Council.

THE plaintiffs and Kali Prosad (the father of the defendants) being jointly interested in certain property, for the recovery of which it was necessary that they should institute a suit, it was agreed that the necessary funds should be provided by the plaintiffs on certain terms mentioned in an *ikrar* dated the 21st Aghran 1274.

The suit was brought accordingly, but unsuccessfully, being dismissed by the High Court on appeal. The costs of the litigation (*i. e.*, the costs of those who were the plaintiffs in that suit) having been paid by the present plaintiffs, they sue now to recover from the heirs of Kali Prosad the proportion for which they are liable according to the *ikrar*. The defence is, that one of the terms of the agreement was that the plaintiffs alone were to bear all the expenses if they "spoilt the case," by not providing the necessary funds; that the plaintiffs did not appeal to the Privy Council against the decision of the High Court; that consequently they "spoilt the case," &c., and that therefore, the defendants are not liable to contribute anything.

The defendants further plead that the defendants in the previous suit (the one brought by the plaintiffs and Kali Prosad jointly) got a decree for costs, on that suit being dismissed; and that they issued execution against the present defendants whose guardian thereupon had to pay Rs. 1,165-5; and the defendants claim to recover in this suit the said sum of Rs. 1,165-5 with Rs. 207-6-11 interest thereon from the plaintiffs.

One of the issues stated in the Subordinate Judge's judgment is: "Did Kali Prosad desire the plaintiffs not to prefer an appeal to the Privy Council?" And the plaintiff, Degendro Mohun, being examined as a witness, said that they did not appeal to the Privy Council, because their case was barred by limitation, he also said that Kali Prosad, in consequence of advice received from the pleaders engaged in the cause, expressly agreed that there was no use in appealing to England. The lower Courts have held it not to be proved that the pleaders advised, or that Kali Prosad agreed that there should be no appeal to the Privy Council. The Lower Appellate Court apparently was of opinion that, by the *ikrar*, the plaintiffs were bound, under all circumstances, to carry the appeal to the Privy Council, unless discharged by Kali Prosad from that obligation. The *ikrar* (which is signed by Kali Prosad and addressed to the plaintiffs) commences by describing the position of the parties, and reciting that they have a right to certain chur lands of which possession had been quietly taken by him whom they proposed to sue. Then it continues: "There is no means left to recover that "possession except by the institution of "legal proceedings. But we are not in a "position to pay the expenses. Wherefore "I enter into this agreement with you that "you should pay all the expenses, including "our twelve annas share, of jointly prose-"cuting such a law-suit from the Court of "first instance to the last Court which "decides, in succession, till finally disposed "of; and, in consideration of such expenses, "I, who am proprietor of six annas, being "one half of the aforesaid twelve annas of "the said chur, do agree to sell to you three

"annas fifteen gundas thereof * * * "and declare that when the said suit, start- "ing from the first Court, has come to an "end by the final order of the Appellate "Court, I shall convey to you by a deed of "sale the aforesaid three annas fifteen "gundas share * * *. The said case "may have to go up in due successive stages of "appeal even to the highest (*literally* High) "Court; should that be necessary, you should "pay the expenses of conducting the same up "to the aforesaid Court. That should we "be cast (God forbid it) by the final decision, "I would be personally liable for eight annas "five gundas share of the expenses which you "may incur on account of our aforesaid "twelve annas from the commencement of "the suit to its final disposal * * *. "Should you spoil the suit by failing to "provide the expenses, I shall not be liable "for any charge, and you shall be answer- "able for the expenses on account of my "share. If I be cast (God forbid it), I shall "not be able to make any settlement or "alienation of my own six annas share with "any one in the re-formed lands of Mouzah "Biara, included in the Thak-map, so long "as your money is not paid off with interest. "But, in the event of our being cast in the "suit (God forbid it), we would not be liable "for the costs of the defendants; the costs "which may be saddled on us are to be paid "by yourselves * * *." We should hesitate before deciding that the *ikrar* bound either party to appeal to the Privy Council against his will. The Privy Council is not expressly named in the *jkrar*, the language of which seems to us to be applicable rather to the ordinary Courts of this country. Moreover, supposing an appeal to be really absolutely hopeless, we can scarcely imagine that this *ikrar* could be held to force an unwilling party to go on with it. But, however that may be, it is quite clear that the only obligation to which the plaintiffs are subject under the *ikrar* the obligation to provide funds for the liti tion. There is no agreement that plaintiffs will appeal. There is only an ag ment that, so long as any proceedings taken, they would provide the requisite fu The *ikrar* does not give the conduct of litigation to the plaintiffs, nor do they ma take to conduct it; it is absolutely si save as to their liability for such cost shall be incurred in the litigation. being so, and there being no evidence Kali Prosad wished to appeal to the P Council, or that he ever called upon plaintiffs to join with him in appealing to furnish him with the necessary funds appealing, we do not see in what respect plaintiffs failed to comply with the term their contract. In our opinion, the plai are entitled to recover from the defendant proportionate share of the moneys adva by them, according to the terms of the ik And, as agreed in the *ikrar*, the defend will be entitled to set off the sum paid them when execution issues against th with interest. The decree in favour of the fendants which the lower Courts passed m be set aside. The case must be remanded the first Court that the amount may be ac rately made up. The Subordinate Judge take the case up at once out of its turn, a dispose of it with the least possible delay. T appellants are entitled to the costs of this peal, and also to the costs of the whole (in all the Courts) in proportion to the amo to which they are ultimately found to b entitled.

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The 23rd June 1876.

Present:

Hon'ble William Markby, *Judge.*

batement of Claim—Limitation.

Case No. 40 of 1876.

Appeal from a decision passed by Second Subordinate Judge of Raj-e, dated the 18th of September affirming the decree of the Moon-f Pubna, dated the 31st of March

Chunder Sen and others (Plaintiffs), *Appellants,*

versus

Behary Roy, who appeared, and Raj der Bhoomick and Prosunno Moyee e, widow of Kashee Chunder Bhoo-, deceased, who did not appear in this l (Defendants), *Respondents.*

oos Mohiny Mohun Roy and *Issur nder Chuckerbutty* for Appellants.

s Kally Mohun Doss and *Doorga Mohun Doss* for Respondents.

aintiff brings a suit for only a portion of a for the whole of which he had previously made a takes all the consequences of his act; but it e of those consequences that his suit should be ed.

Act X. of 1859, does not prevent a person right to any land from bringing a suit for a on of his right within twelve years.

STAINED from giving my judgment in se when it was brought on, because I d to see whether the learned pleader e respondent, who was not then present, put any more satisfactory construction the judgment of the Subordinate Judge I was able to do without his assistance; e pleader, who is now present, confesses lf unable to do so, and, therefore, it s to me impossible to come to any other lusion than that the Subordinate Judge for some reason or other chose to think that the plaintiff could not bring a suit to establish his right to a portion of the fishery in question, because at some time or other he had claimed to collect rent over the whole fishery. It was exceedingly undesirable for the Subordinate Judge, even if he thought this, to dismiss the suit upon this ground without going into the merits, as the point had never been raised before, and it is quite clear that, if raised at all, it should have been raised when the case was in this Court before, and when no objection was taken to the frame of the suit, and a remand was directed in the presence of all parties. Besides this, the objection itself is wholly without foundation. If the plaintiff found that he could not establish his title to the whole fishery, or for some reason or other considered it advantageous to himself to put forward his title to only a portion of the fishery, he was perfectly at liberty to do so, but, of course, he must take any consequence that may ensue from his having taken such a course. It is not a consequence of his so doing that this suit should be dismissed.

Then again, as to the question of limitation, it is quite clear that the Subordinate Judge is wrong in the view which he has taken of the law on this subject. So long ago as in the case reported in the 7 Weekly Reporter, page 152, it was decided that the section* relied upon by the Subordinate Judge does not prevent a suit for establishment of title being brought after the period of limitation prescribed therein. That section duly prevents any further claim being made after the year has expired for the rent which has been refused.

Therefore, upon both the grounds, the

* S. 77, Act X. of 1859.—*Peacock, C.J.*: "It is clear that it was not the object of that section to prevent the party who has the right to the land to bring his action to try his title to the land within twelve years from the date of dispossession."

Subordinate Judge's decision is wrong, and must be set aside, and the case remanded for the second time in order that he may dispose of the appeal on the merits.

Costs will abide the result.

The 26th June 1876.

Present:

The Hon'ble F. B. Kemp and F. A. B. Glover, *Judges.*

Consideration—Good Faith of Deed of Sale—Cross-conveyance—Arrears of Rent.

Case No. 447 of 1862.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Behar, dated the 18th July 1862.

Maharanee Inderjeet Kooer, widow of Maharajah Het Narain Singh (Plaintiff), *Appellant,*

versus

Luchmee Narain Pooree and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Moonshee Mahomed Yusuf* for Appellant.

Mr. C. Gregory for Respondents.

Case No. 502 of 1862.

Musst. Ameeroonnissa Begum *alias* Nunkoo Saheba (one of the Defendants), *Appellant,*

versus

Maharanee Inderjeet Kooer, widow of Maharajah Het Narain Singh (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Mr. R. T. Allan and *Moonshee Mahomed Yusuf* for Respondent.

Khajah Hossein Ali Khan, father of Sultan Jan, Hossein Jan, and Miran Jan, took a lease from Rajah Inderjeet Sing of certain mehals for a term of [illegible] at a rental of Rs. 28,971. Khajah Hossein A[illegible] died six years after, but the Maharajah [illegible] also dying before that time, and the mehals [illegible] fallen heavily into arrears, his son Maha[illegible] Narain Singh, husband of present plaintiff, [illegible] set aside the lease on account of those arr[illegible] failed. Proceedings taken against Hossein A[illegible] for arrears were partly successful, and went [illegible] in which year Sultan Jan, one of the sons of [illegible] Ali Khan, sold to his wife, Ameeroonnissa, a[illegible] of his father's estate, in consideration of [illegible] kurruree leases which she had given her [illegible] brothers in lands held in her own right. In a [illegible] quently brought by Ameeroonnissa to set a[illegible] mokurruree leases, Maharajah Het Narain (wh[illegible] claims against the lessees, was made a party to [illegible] opposed the cancelment of the leases, on th[illegible] that the application was fraudulently made to [illegible] demands on the lessees. His opposition was [illegible] and on more than one occasion his dema[illegible] him those of his widow were met out of the [illegible] ceeds of these mokurruree leases. When, the[illegible] Ranee-widow came before the High Court in [illegible] suit in which she sought to make the estate, w[illegible] tan Jan had sold to Ameeroonnissa, liable for th[illegible] of his brothers—pleading that this sale was a fr[illegible] one intended to evade her claims against those [illegible] —the High Court held that, inasmuch as A[illegible] nissa's effort to set aside her mokurruree lea[illegible] brothers-in-law had proved infructuous, the Co[illegible] not decide that both the mokurruree tenure[illegible] estates conveyed to Ameeroonnissa in con[illegible] thereof were liable to satisfy the Maharajah He[illegible] and his Ranee's decrees. The Ranee's suit was [illegible] ingly dismissed. She appealed to the Privy Co[illegible] and the Privy Council, finding that the ground on [illegible] the High Court had dealt with the suit had [illegible] surprise to the plaintiff, remanded it for re-trial in [illegible] country on the two issues—(1) whether the prop[illegible] Khajah Hossein Ali Khan was really transferred in [illegible] faith by Sultan Jan to Ameeroonnissa in consi[illegible] of the mokurruree leases granted by her out of [illegible] estate to Sultan Jan's brothers, and (2) whether, [illegible] decisions given in former proceedings, to which [illegible] was a party, and by which she benefited, the Ra[illegible] widow was precluded from disputing the good fai[illegible] the above-mentioned conveyance.

The case now returns to the High Court, after re-tri[illegible] on remand in the lower Court; the Subordinate Judge having found that the consideration for the propert[illegible] conveyed to Ameeroonnissa by Sultan Jan was certa[illegible] property conveyed by that lady to Sultan Jan's brothe[illegible] in mokurruree lease; and that this transaction was n[illegible] fraudulent, and also that the Ranee-widow was precl[illegible] ed from taking exception to the deed of sale, after the decision given in presence of her husband, proving that

the mokurruree property had been exchanged for the mehals:

FOUND by the High Court, on a consideration of the fresh evidence tendered by the plaintiff in connection with the previous proceedings, that there was no reliable direct evidence that the transaction represented in the deed of sale was entered into with the view of defrauding the plaintiff; that Ameeroonnissa certainly had some properties belonging to herself; and that, though her deed of sale includes other properties which Sultan Jan subsequently conveyed away to another person, there is evidence to show that Ameeroonnissa was never put in possession of those other properties as she was of that which she claimed:

HELD, also, that, in the circumstances, it was not necessary to decide the second issue; but that, if it had been necessary to do so, the Court would hold that, though the plaintiff's predecessors had acknowledged the good faith of Sultan Jan's conveyance to Ameeroonnissa, the Court did not think they had acknowledged that the consideration for that deed was a grant of the mokurruree leases to Sultan Jan's brothers.

THE plaint in this case was filed by Maharajah Het Narain Singh, who has been succeeded by his widow, Moharanee Inderjeet Kooer. The suit was instituted on the 20th February 1861. It was decided by the Principal Sudder Ameen of Behar on the 18th of July 1862 in favour of the plaintiff, and the decree ordered that, save and except Deodhar Chutturwar, 4 annas of Ramnuggur, and 14 annas of Rajpore, all the rights and interest that Khajah Taleb Ali Khan *alias* Sultan Jan, the husband of Ameeroonnissa Begum, held at the time of his death in the properties, the subject of this suit, were to be sold in satisfaction of the plaintiff's decree.

Both parties appealed to this Court, Moharanee Inderjeet Kooer, who, on the death of Maharajah Het Narain Singh, her husband, succeeded to his estate, being the appellant in No. 447, and Ameeroonnissa Begum being the appellant in No. 502. The two appeals were heard on the 31st of August 1863 by Mr. Justice Kemp and the late Mr. Justice Shumbhoonauth Pundit. We were of opinion that the Principal Sudder Ameen had come to a correct conclusion in the matter of the properties Deodhar Chutturwar, 4 annas *hissa* of Ramnuggur, and 14 annas of Rajpore, which formed the subject of the appeal by the Ranee. With regard to the appeal of Ameeroonnissa, which had reference to the sale to her by her husband, Khajah Taleb Ali Khan, *alias* Sultan Jan, we differed from the Principal Sudder Ameen. We held that there was nothing to taint that transaction with fraud beyond any presumption that might arise from the fact of the parties standing in the position of husband and wife. We further observed that certain ancestral properties belonging to Ameeroonnissa were given in a mokurruree tenure to the other heirs of Khajah Hossein Ali, that is to say, to the brothers of Sultan Jan, and that the properties conveyed by the bill of sale, executed by Sultan Jan to Ameeroonnissa Begum, were the consideration for the properties which that lady had given to his brothers in mokurruree. We also remarked that Ameeroonnissa had sued to set aside the deed which created these mokurruree tenures in favour of the two brothers; that the Ranee's husband, the late Maharajah Het Narain Singh, was a party to that suit; that he in that suit had contended, as against Ameeroonnissa, that the grant of the mokurruree tenures by her was *bonâ fide;* that her suit to set aside that grant was collusive to defraud him; and that the properties covered by the mokurruree grant were liable for his decree for rent as against the heirs of Khajah Hossein Ali; that in the present case, his successor, the Ranee, seeks to bring to sale the properties which were given in exchange, and as a consideration for the properties which Ameeroonnissa granted to the other heirs of Khajah Hossein Ali, namely, the brothers of Sultan Jan; that, as the suit of Ameeroonnissa to set aside the mokurruree tenures had been dismissed by the first Court, and her appeal rejected by

another Bench of this Court, we could not, under the circumstances, hold that both the mokurruree tenures and the properties conveyed in consideration thereof were liable to satisfy the plaintiff's decree. The result of our decision was that we modified the decision of the Principal Sudder Ameen, dismissed the whole of the plaintiff's claim and her appeal with costs, and decreed the appeal of Ameeroonnissa Begum with costs payable by the plaintiff.

Upon this the plaintiff appealed to the Privy Council. Their Lordships, after giving a short history of the rent-suits brought by the predecessor of the plaintiff, Maharajah Het Narain Singh, against his lessee, Khajah Hossein Ali Khan—which litigation their Lordships described as extremely complicated—observe that *that* litigation was determined by the decree of the Principal Sudder Ameen, dated the 30th of December 1856, which decreed that the plaintiff do recover from the heirs of the original lessee, Khajah Hossein Ali Khan, namely, Hossein Jan, Meerun Jan, and Musst. Poti Begum, as also from the estate of Sultan Jan, the sum of 1,64,879 rupees and a fraction; and that Ameeroonnissa Begum be exonerated. The properties which the Maharajah sued to make liable in satisfaction of his decree for rent were, *1st*, Mouzah Deodhar Chutturwar; *2ndly*, fourteen annas of Mouzah Rajpore; and, *3rdly*, other properties forming part of the estate of the Khajah, alleged to have been transferred by Sultan Jan to Ameeroonnissa Begum, and still in her possession; and, *4thly*, 4 annas in the Ramnuggur estate. The claim of the appellant to the 4 annas of the Ramnuggur estate was given up, as also was the claim to Deodhar Chutturwar. So that the contention between the parties before their Lordships of the Privy Council was reduced to the properties mentioned in the 2nd and 3rd classes, namely, 14 annas of Mouzah Rajpore, being part of the estate of Khajah Hossein Ali Khan, alleged to have been transferred by Sultan Jan to his wife, Ameeroonnissa Begum, and to have been afterwards sold by her to Ramzan Ali, and by him to the present possessors, who were made defendants on record, and the other property forming part of the estate of the Khajah, alleged to have been transferred by Sultan Jan to Ameeroonnissa Begum. With reference to the title of Ameeroonnissa to these properties their Lordships say that *that* title is if these properties were sold and conveyed to her by her husband, Sultan Jan, in consideration of 49,000 rupees in cash and a diamond ring, under a deed of sale of the 19th of November 1847. They observe that this bill of sale is not to be found in the present record, though it appears from the judgment of the 30th December 1856 that the document or, at least, a copy of it, was filed in the original suit, wherein Ameeroonnissa contended that she was not in possession of any part of her husband's estate in the character of heir; and that no proof, certainly no satisfactory proof, has ever been given of the payment of the 49,000 rupees, or of the delivery of the diamond ring; that, under these circumstances, the Principal Sudder Ameen came to the conclusion that the conveyance, dated the 19th of November 1847, from Sultan Jan to his wife, Ameeroonnissa Begum, was a fictitious transaction and that the property which was the subject of that transaction continued to be part of the estate of Sultan Jan; that *so much of it* as remained in her hands was subject to be attached and sold in satisfaction of the plaintiff's judgment-debt, that is to say, the debt for rent. Their Lordships then say that the view taken by this Court of the above transaction appears to be that, admitting the expressed *consideration for*

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nveyance of the 19th November 1847, merely nominal, there was, in the grant mokurruree tenure by Ameeroonnissa of her own estate, and in the retention her consent of Deodhar Chutturwar by n Jan, a consideration moving from her, ient to support the transfer to her of hajah's estate; and that, at all events, ppellant, whose husband had taken the it of the decree of the 30th mber 1860, and of the execution by awarded against the mokurruree res, could not dispute the sufficiency of consideration. Their Lordships say "they would have been disposed to ur in this view if they were satisfied the defence to the suit which it involves been clearly pleaded and regularly ;" but that it appeared to them remely doubtful, to say the least, whether appellant had the means, which she ht to have had, of meeting such a case; the title of Ameeroonnissa, as pleaded, upon a conveyance in consideration of 49,000 rupees and the ring; that it is that the particular consideration is not ressed in, nor made part of, the 4th issue d in the case, which is merely, whether, virtue of a *bonâ-fide* kobala, that is to , without collusion and fraud, executed her husband, the defendant was in possion of the property sold. But," observe ir Lordships, "it is not the less possible t the point taken by the High Court was surprise on the plaintiff; that there is no ce of its having been taken by Ameeroonisa in the Court of first instance." herefore their Lordships conclude that hey "ought to give the appellant (the plaintiff) the option of having the case as between her and the respondent, Ameeroonnissa, remanded for re-trial upon two issues." The rest of the judgment of this Court was affirmed, and the case has come back to this Court with directions, if the appellant should desire it, to try two issues as between the Ranee-plaintiff and Ameeroonnissa Begum, under the provisions of section 354 of Act VIII. of 1859—those issues being, *first*, "Whether the property of the late Khajah Hossein Ali Khan was really, and in good faith, transferred by Sultan Jan to the respondent, Ameeroonnissa Begum, in consideration of the grant by her of the mokurruree tenures out of her own estate," and, *second*, "Whether, regard being had to the proceedings in the suit No. 27 of 1858 and to the decision therein of the Principal Sudder Ameen dated the 30th of November 1860, the appellant is precluded from disputing that the property was *bonâ fide* so transferred to the respondent." Their Lordships, in granting this remand, further observe that, whilst they give the appellant the option of a remand to which they thought she was, in strictness, entitled, they throw out for the consideration of both parties whether it may not be better for both to avoid further litigation by consenting to the dismissal of this appeal as against Ameeroonnissa without costs. Then there was a direction with reference to the costs of the appeal as between the appellant and the respondent, Ameeroonnissa, that, if it should so happen that the case should go back to India, those costs should be taxed, and be hereafter paid and received as incurred in the cause according to the final result.

The case was remanded to the Subordinate Judge of Gya by this Court to try the two issues laid down by Her Majesty in Council, and both parties were given an opportunity to adduce such further evidence as they might be able to produce on the trial of those issues. The finding of the Subordinate Judge on remand is to be found in his judgment dated the 29th of April 1874. We do not purpose to give the reasons assigned by him for coming to the conclusion at which he

has arrived. They will be found in his decision. Suffice it to say that he found that the consideration for the properties which were transferred by Sultan Jan to Ameeroonnissa Begum, was certain properties conveyed by a mokurruree lease executed by that lady in favour of the two brothers of Sultan Jan; and that this transaction was not fraudulent for the purpose of evading payments of debts due by the late Khajah Hossein Ali Khan, but was a real transaction, and made in good faith. On the second issue the Subordinate Judge was of opinion that, as it had been proved in the presence of the predecessor of the present plaintiff, by a final decision dated the 30th of November 1860, that the mokurruree property had been exchanged for the mehals covered by the deed of conveyance which was the subject of the suit, the plaintiff is now precluded from taking exception to the deed of sale as being fraudulent.

The case has now come up to this Court, and has been fully argued before us. Before we proceed to express our own opinion upon the two issues laid down by their Lordships of the Privy Council, we desire to refer to certain facts which appear to be admitted or not disputed by the parties.

Khajah Hossein Ali Khan, the ancestor or father of Sultan Jan and of his two brothers, Hossein Jan and Miran Jan, and of his sister, Poti Begum, took a lease from Rajah Inderjeet Singh of certain mehals, the term thereof being from 1248 F. S. to 1261 F. S., and the jumma 28,971 rupees per annum, omitting fractions. The lessee, Khajah Hossein Ali Khan, died in Jeyt 1254 F. S. The original lessor, Maharajah Inderjeet Singh, dying, was succeeded by Maharajah Het Narain Singh, and he took measures to eject the lessee, and to determine the lease on the ground that the rent was heavily in arrears, but was unsuccessful, the lease being upheld by the Courts. So that it is clear that, dur the lifetime of the lessee, Khajah Hos Ali Khan, proceedings had been taken w a view to eject him on the ground that was in arrears. Maharajah Het Na Singh, who succeeded Maharajah Inder Singh, sued for the rents of 1251 F The demand was settled by part payment cash, and by a razinama executed by lessee, Khajah Hossein Ali Khan, promis to pay the balance. Then there were p ceedings on the part of the Rajah to att the properties leased, and an attempt to c lect rents direct from the ryots. Th proceedings were opposed by the kutkinad or sub-lessees under the lessee, and they w supported in their claim by the heirs of original lessee, and, on the 16th of Sept ber 1847, there appears to have been award under the provisions of Act IV. of 18 by the Magistrate, directing the kutkinad to be kept in possession; and this aw of the Magistrate was confirmed by Sessions Judge on the 13th of Novem 1847. On the 19th of November of same year, or very shortly after the termin tion of these proceedings under Act IV., deed which is now the subject of conten tion between the parties was executed. There were other suits for rent by Maharaja Het Narain Singh for different periods, and those suits were finally determined by the decision of the Principal Sudder Amee of Behar, dated the 13th of December 1856. In that decision a large sum of money, upwards of a lakh of rupees, was found to be due to the Rajah as rent from Khajah Hossein Ali Khan for the period *during* which he was in possession under the lease and also from his heirs.

We now come to the question whether the properties conveyed by the deed of the 19th of November 1847 were really and in good faith transferred by Sultan Jan to the respondent, Ameeroonnissa Begum, in *consi-*

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ion of the grant by her of the mokur- tenures out of her own estate. As dy observed, their Lordships of the y Council would have been disposed ncur in the view which this Court took his deed, but for the consideration that appellant, the Ranee, had no means, ch she ought to have had, of meeting it. evidence which has now been adduced the Ranee after the remand is of the t unsatisfactory character. A few wit- es, peadas and other servants of the ee, some of whom were formerly in the ice of Khajah Sultan Jan, have been mined. They have been disbelieved by Subordinate Judge, for reasons which has given in his judgment, and, after ing their evidence read, we entirely agree h him in the opinion that it is, as he cribes it, "utterly false and untrue." ey depose to conversations between Sultan and his servants with reference to this saction, and they would make out that tan Jan had, in their presence, openly sulted his Amla as to how he could de the demand of the plaintiff on account of arrears of rent due to him; and that had been recommended by his dependants resort to the stratagem of executing a namee conveyance in favour of his wife. ere is, in our opinion, no reliable direct idence whatever that this transaction was tered into with a view of defrauding the intiff.

Then it is contended by the pleaders for e appellant that Sultan Jan had, after this nveyance, dealt with a portion of the pro- rty covered by the conveyance as owner thereof; and we are referred to a lease granted to the wife of Nawab Ameer Ali Khan Bahadoor, and to a subsequent sale of the same property by Sultan Jan to the same gentleman. Doubtless the property which was conveyed to Nawab Ameer Ali Khan Bahadoor was included in the deed of conveyance executed by Sultan Jan to his wife Ameeroonnissa Begum on the 19th of November 1847. But there is evidence on the record that Ameeroonnissa Begum was never put in possession of these mouzahs, although they were, as already observed, covered by the deed of sale.

With reference to the other properties covered by the deed of sale, there is reliable evidence that Ameeroonnissa Begum has been in possession of them from the date of the deed of conveyance. It is not contended that Ameeroonnissa Begum had no estates of her own; and it is also in evidence that the properties which Ameeroonnissa Begum gave in mokurruree to the two brothers of her husband, Sultan Jan, were estates belonging to her; and that the value of those estates was considerably higher than that of the estates which formed the subject of the conveyance now under consideration, namely, the conveyance of the 19th of November 1847. In the former suit, No. 27 of 1858, the decision in which was passed on the 30th of November 1860, Ameeroonnissa sued to set aside the mokurrurees to the two brothers of her husband, on the allegation that those properties belonged to her own exclusive estate; and that she never had granted the mokurrurees to her husband's brothers. Her husband's brothers were examined in that suit, and the husband of the Ranee-appellant was a party to it. He contended that the deed granting the mokurruree, which was executed by Ameeroonnissa in favour of the two brothers of her husband, was a *bonâ-fide* transaction; and that her allegation in that suit was a fraudulent one with intent to evade his claim for rent as against the heirs of the original lessee, Khajah Hossein Ali. The result was that the mokurrurees were upheld. And it is not disputed that the Ranee, or, at all events, her predecessors, proceeded as against those mokurrurees which, by the

decision of the 30th of November 1860, were found to have been granted by Ameeroonnissa to the two brothers of her husband for the recovery of the rent due by the lessee Khajah Hossein Ali Khan, and that large sums of money have been recovered by the sale in execution of those mokurrurees.

We therefore hold, looking to the fact that the properties granted in mokurruree to the two brothers of Sultan Jan were the exclusive properties of Ameeroonnissa Begum, and that they were, if not of higher value (which, upon the evidence, it appears they were), certainly of equal value to the properties which Sultan Jan transferred to Ameeroonnissa, that the consideration of the transfer made by Sultan Jan to his wife Ameeroonnissa Begum was the grant by her of the mokurruree tenures out of her own estate to the two brothers of Sultan Jan, and that, in transferring this property to Ameeroonnissa Begum, the transaction was a real one and done in good faith, and not with a view to defraud the plaintiff. This being our finding on the first issue, it appears to us unnecessary to discuss the second. Were it necessary to do so, we should hold that, although the Ranee's predecessors in the suit No. 27 of 1858 contended that the mokurruree granted by Ameeroonnissa to the two brothers of her husband, Sultan Jan, was a *bonâ-fide* transaction, we do not think that the appellant's predecessor admitted in that suit that the consideration for the deed of conveyance by Sultan Jan to his wife, Ameeroonnissa, dated the 19th of November 1847, was a grant by her of the mokurruree tenures out of her own estate.

In this view of the case, we dismiss the suit of the plaintiff, appellant, and confirm the finding of the Subordinate Judge, dated the 29th of April 1874, passed after the remand by their Lordships of the Privy Council. The appeal will be dismissed with all costs payable by the plaintiff, appellant. The costs of the Privy Council as between the appellant and the respondent Ameeroonnissa Begum, according to the direction of their Lordships, will be taxed and paid, as part of the costs in the case by the plaintiff, appellant.

The 23rd June 1876.

Present:

The Hon'ble William Markby, *Judge.*

Jurisdiction—Rents of Future Years—Landlord and Tenant.

Case No. 115 of 1876.

Special Appeal from a decision passed by the Officiating Judge of West Burdwan, dated the 10th November 1875, reversing the decree of the Moonsiff of Bishtopur, dated the 26th July 1875.

Mudhoo Soodun Roy (Plaintiff), *Appellant*

versus

Sreeputty Bhuttacharjee (Defendant), *Respondent.*

Baboo Nilmadhub Sein for Appellant.

Baboo Rashbehary Ghose for Respondent.

In a suit over the precise character of which some former litigation between the parties had thrown some doubt; and the Collector and District Judge were at variance as to what the plaintiff exactly sought; and the High Court did not think that a mere reference to resumption-proceedings in the record justified it in regarding the decree in the former case as a decree for possession, HELD that, even if that decree had simply declared the land in suit to be liable to assessment, a suit of this kind could not be maintained in this country, because, apart from special provisions of statute, Courts of Justice had no power, in any one year, to settle the rate of rent for future years between occupier and owner of land.

[NOTE.—A Collector, in his executive capacity, can assess future rents on certain tenures; and the ruling in this case is that no similar authority rests in Law Courts.]

IT seems to me in this case that, having reference to the form in which the former suit was brought, and the allegation that it

was brought under Regulation II. of 1819, and the further statement in the Collector's judgment that the party claimed under a lakheraj grant prior to the 1st December 1790, it is probable that the proceedings then taken were proceedings under sections 6 and 9 of Regulation XIX. of 1793; and, if that be so, of course this suit would be altogether misconceived. But, even if that be not so, then it must be taken that the proceeding was one under section 28, Act X. of 1859. Viewing it as a proceeding under that section, the District Judge has come to the conclusion that the decree obtained was a decree for possession. Now, this I am not prepared, at this moment, to assent to. The decree is one which it is extremely difficult to construe, and there seems to have been some difference between the Collector and the District Judge who heard that suit as to what the claim of the plaintiff really was. And there is nothing in either decree, that is, in the decree properly so called, which would make it clear what the Courts intended. I am not prepared, merely because the words resumption-proceedings are used, to say that this was a decree for possession. But, even if it be not so, and it was a decree simply declaring that the land was liable to assessment, still I am at a loss to see how this suit can be maintained. This is not a suit to recover rent which has accrued due in some past time, but a suit brought in the year 1281 to declare what shall be the amount of rent payable for the year 1282. It seems to me that that can only be done under the special provisions of statute. Apart from such special provision, Courts of Justice have no power to settle the rate of rent for future years between the occupier of land and the owner. Then, that being so, I asked the pleader for the appellant to point out under what provision of the law he can maintain this suit, and he has been unable to point out any.

It seems to me, therefore, that, whatever view be taken of the litigation of 1864, I am still bound to hold that this is a suit which the Courts in this country have no jurisdiction to maintain. It must be understood that I base my decision upon this ground, because I do not give my assent to all that has been said by the District Judge in this matter; and there may be still some further trouble in ascertaining what the true position of the plaintiff and of the defendant is. I therefore wish it to be understood that I dismiss this appeal upon this ground only that the Courts below had no jurisdiction to entertain this suit.

The special appeal is dismissed with costs.

The 28th June 1876.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Probate of Will—Adopted Son—Objection of Next of Kin.

Case No. 259 of 1875.

Miscellaneous Regular Appeal from an order passed by the Officiating Judge of Zillah Shahabad, dated the 9th of August 1875.

Baboo Byjnath Shahai and others (Opposite Parties), *Appellants,*

versus

Desputty Singh, a minor, through Abdool Hye, manager (Petitioner), *Respondent.*

Mr. Kennedy and *Moonshee Mahomed Yusuf* for Appellants.

Messrs. Paul and *Woodroffe* for Respondent.

Where an adopted minor son applied through his manager for probate of the will of his adoptive father, and some creditors of the father's next-of-kin, who would have inherited the father's property if the plaintiff had not been adopted, opposed the grant of the probate, and their objections were recorded by the Judge, HELD that the said creditors had no standing

in the case, and that the Judge had acted illegally in giving them one.

Kemp, J.—On the 14th of July 1875, Baboo Desputty Singh, a minor, through the manager of his estates, Abdool Hye, applied to the District Judge for probate of the will of the late Bindessuree Pershad Singh, who, it is alleged, died at Arrah on the 31st of July 1871, leaving properties, moveable and immoveable, situated in the District of Shahabad. To the petition an instrument, purporting to be the will of the deceased, was annexed. Mr. J. H. Thornton, Civil Surgeon of Arrah, one of the subscribing witnesses to the said instrument, verified the petition as laid down in section 248, Act XI. of 1865. Upon this petition an order was passed, directing advertisements to be made at the Collectorate and at the Civil Courts of the District. Notice also to be served on parties to suits before the Subordinate Judge in which Desputty Singh was concerned. This application to come up on the first miscellaneous day after Mr. Palmer takes charge, say Saturday, the 24th July. This order was passed by Mr. Geddes.

Byjnath Shahai and others, appellants, are the creditors of Baboo Reetbhunjun Singh; and they objected to the grant of the probate on the ground that Desputty Singh was not the heir of the late Bindessuree Singh, but that their debtor, Reetbhunjun, was.

It appears that notices were issued by the Subordinate Judge of the District, dated the 30th July 1875, calling upon Byjnath Shahai and others to file any objections they might have to make in the matter of the petition of Abdool Hye before the Judge of the District on or before the 22nd of July 1875. They appeared and filed their objections. The Judge, on the 9th of August, after considering the objections of Byjnath Shahai and others, passed the following order: "That letters of administration will be granted by this Court to Moulvie Abdool Hye, petitioner, as manager and next friend to Ba Desputty Singh, minor, on his undertakin make a true inventory of the property credits of the late Baboo Bindess Pershad Singh, deceased, and to exhibit same in this Court at or before the ex tion of one year next ensuing, and to re a true account thereof, and also on his f a bond with two sureties engaging for collection, getting in and administering estate of the deceased, Baboo Bindess Pershad Singh."

Each party to pay their own costs.

On the case coming before us, it was tended by the learned Advocate-General the respondent that the appellants ought to have been made parties to these proce ings; and he asked the Court to dismiss appeal without hearing their Counsel entering into the merits. We were of opi that, as the appellants were made parti the proceedings by the action of the Co and were called upon to file their objecti and did file them without any objection the part of the respondent, that we o to hear the appeal. We therefore ca upon the learned Counsel, Mr. Kenn who appeared for the appellants, to satisfy that his client was in a position to oppose grant of probate of the estate of the l Baboo Bindessuree Pershad Singh. A hearing his argument, and that of the lear Advocate-General for the respondent, we of opinion that the appellants ought not have been permitted to object in the low Court to the grant of probate.

Numerous cases in the English Court were cited by the learned Counsel on bot sides, but in deciding this case we have not to look to what is or was the English Law on the subject. We must look to the Act itself, Act X. of 1865, as the law applicable to the case.

The application for probate having been formally made, it was lawful for the District

, under section 250, Act X. of 1865, to ations calling upon all persons claim- have any interest in the estate of the ed to come and see the proceedings the grant of probate or letters of istration. The citation to be fixed up e conspicuous part of the court-house, lso in the office of the Collector of the ct.

caveats on the part of the appellants us had been lodged against the grant bate or letters of administration. The , therefore, acted illegally in directing s to be served on the appellants through ubordinate Judge of the District, invit- hem to file any objections they might o make against the grant of probate. ppellants cannot be said to be parties ng any interest in the estate of the sed," within the meaning of section 250 e Act. The appellants, who are the tors of Reetbhunjun Singh, who, in the of Baboo Bindessuree Singh having without executing a will and without g adopted Baboo Desputty Singh, on behalf the application for probate made, he being a minor, may be the of the late Baboo Bindessuree Singh; hat does not entitle them to claim, as ght, as interested in the estate of Baboo essuree Singh, to oppose the grant of ate or letters of administration.

e order granting letters of administra- o the respondent is affirmed: such order, ever, being without prejudice to the appel- , who have no present right to oppose grant, nor precluding them from seek- any further remedy they may be advised rsue as against their debtor, Reetbhunjun h.

he appeal is dismissed with costs. der's fees, ten gold mohurs.

irch, J.—I, also, am of opinion that who, in the petition of appeal, style nselves "opposite parties," ought not to have been allowed "to come and see the proceedings before the grant of letters of administration."

Section 250 contemplates the citation of those directly interested in the estate of the deceased. Its provisions cannot, I think, be strained to include creditors of the next-of-kin to the deceased. It is admitted that the appellants are not the only creditors of Reetbhunjun, but that there are several other creditors, and, if the appellants had succeeded in their opposition to the granting of letters of administration, they would not be in any better position than other creditors of Reetbhunjun.

We have to be guided by the provisions of Act XXI. of 1870, and those sections of Act X. of 1865 which are, by the former enactment, declared to apply to wills made by Hindoos after 1st September 1870. I do not think it incumbent upon us to consider what the law and practice were antecedent to the law by which we have to be guided. Nor do I think it necessary to discuss, in a case such as we have before us, the English cases cited by Mr. Kennedy. I would only remark that no case which has been cited supports the learned Counsel's contention that a creditor, not of the deceased, but of his next-of-kin, is a person interested in the estate of the deceased, and entitled to come in and controvert a will said to have been executed by the deceased. It has been held on the Original Side of this Court (12 B. L. R., p. 427) that, since the passing of Act X. of 1865, the Courts in this country must look to that Act, and it alone, for the law of British India applicable to all cases of testamentary or intestate succession, and the correctness of that ruling has never been impugned.

Then, as to the argument of the learned Counsel that his client is barred from taking any further steps against the estate, and prejudiced by having been made a party to these proceedings, I find nothing in the

Act which leads me to conclude that this argument has any foundation. By section 242, letters of administration are conclusive as to the representative title of the person who obtains them, and creditors of the deceased must look to him for satisfaction of their debts. If the appellants have any claim against the estate of the deceased, I fail to see how they can be deprived of their remedy by an order granting letters of administration.

What we now decide is that the Judge was wrong in citing the appellants to see the proceedings, and that they have no right to oppose the granting of letters of administration. We cannot, on their appeal, go into the merits of the case, and the result is that the appeal must be dismissed with costs.

The 28th June 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and Romesh Chunder Mitter, *Judge*.

Cancelment of Lease—Release from Lease—Lease Valid only as a Whole—Submission to Competent Court.

Case No. 46 of 1875.

Special Appeal from a decision passed by the Judge of Zillah Shahabad, dated the 15th of September 1874, modifying the decree of the Subordinate Judge of that District, dated the 30th of May 1874.

Mussamut Lali Konwar (Plaintiff), *Appellant*,

versus

Phillip William Carter and another (Defendants), *Respondents*.

Baboos Mohesh Chunder Chowdhry and *Doorga Mohun Dass* for Appellant.

Mr. R. T. Allan for Respondents.

Where a plaintiff brought a suit to recover the rents of some lands which he had leased out to defendant, but defendant pleaded that he had relinquish lands, because, in a suit brought against him by party, who claimed a portion of the lands, a decr given the said party possession of the portion by him; and the question arose whether defend justified in relinquishing the lands, seeing th decree had been reversed on appeal, and that def if he had waited, would have been put in pos of all the land covered by his lease, HELD that ant was right in submitting to the decree of a C competent jurisdiction; that he could not be e to content himself with the residue of the la untouched by the decree, or to wait for a decree might restore the portion taken away from hi that, having given up his lease to the plaintiff, h not liable for any rents.

[NOTE.—The question has not been raised in th whether, if the third party, who obtained a d against defendant, had been made a co-defendan him in this suit, the plaintiff would have recover amount of the rents from him.]

Garth, C.J.—(Mitter, *J.*, concurri

THIS is a suit brought by the plaint recover the rent of certain villages w he had leased in entirety to the defendan

Whilst the defendant was in posse under that lease, a suit was brought b third party in the Civil Courts to rec possession of a five-annas' share of th villages; and in that suit the plaintiff obta a judgment under which the defendant w dispossessed of the five-annas' share of property.

Under these circumstances he at on surrendered his lease to the plaintiff, and th question is, whether he was justified in doing.

We consider that he was. He contracte for a lease of the whole property; and h had a right as against his landlord to insi upon being secured in the possession of th whole; and having now been dispossessed o a part of the property by a title paramount to his landlord's, he was not bound to continue in possession of, and pay rent for, the residue.

Then it is said that the judgment under which the defendant was dispossessed was appealed against, and ultimately reversed;

at, therefore, if the defendant had , he would have been confirmed in his of the whole property. But we think his makes no difference. Was the bound to wait, probably for years, the appeal had been decided, and in eantime be compelled to lose the enjoy- of a large portion of the property and tent himself with the residue?

think not. We consider that, upon efendant being evicted from a portion lands by the judgment of a Court of etent jurisdiction, he had a right, if pleased, to resign his lease.

did resign it, and consequently he is able for any subsequent rent.

e appeal is dismissed, and with costs.

The 28th June 1876.

Present:

Hon'ble Sir Richard Garth, *Kt., Chief stice,* and Romesh Chunder Mitter, *udge.*

ration of Right—Certificate of Sale—Certified Purchaser"—S. 260, Civil Procere Code—Benamee Purchase.

Case No. 1383 of 1875.

cial Appeal from a decision passed by e Officiating First Subordinate Judge f Patna, dated the 30th March 1875, firming the decree of the Officiating irst Moonsiff of Patna, dated the 18th May 1874.

Bunda Ali Khan (Plaintiff), *Appellant,*

versus

ussamut Bibee Ameerun and Reazooddeen Ahmed who appeared, and Lalla Sobun Lall who did not appear, in this appeal (Defendants), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Baboo Mohesh Chunder Chowdhry and *Mr. M. L. Sandel* for Respondent.

If a person is the person to whom, under s. 259, Act VIII. of 1859, a Court is directed to grant a sale-certificate, he is entitled to be regarded as the "certified purchaser" any time after the acceptance of his bid at the execution-sale, even though the certificate may not actually have been granted to him before any suit against him, in connection with the property purchased by him, has been instituted.

Where a plaintiff sued for a declaration of right to certain land purchased, as he contended, on his account by the defendant at an execution-sale; and the Moonsiff found that the facts were as alleged by plaintiff, but tha the was debarred by s. 260, Act VIII. of 1859, from interfering with the possession of defendant who had obtained a sale-certificate: and plaintiff contended on appeal that the case did not fall within s. 260, inasmuch as defendant had not obtained the sale-certificate when the suit was first instituted, FOUND that, though the defendant had not obtained the sale-certificate before the suit was instituted, yet he had obtained it while the suit was pending; and HELD that, being the person to whom the Courts were directed under s. 259 to grant the sale-certificate, he was to all intents and purposes the certified purchaser under s. 260.

THIS is a suit brought by the plaintiff to obtain a declaration of his right to certain land which was purchased at an execution-sale by, and in the name of, the defendant; and the plaintiff's case is that he was the real purchaser; that the purchase was effected with his money; and that he, therefore, and not the defendant, is entitled to the certificate of sale, and to possession of the property.

The defendant's case is that he himself was the real purchaser, and, moreover, that he (the defendant) was declared to be the purchaser at the sale, and that pending the suit, he has actually obtained from the Court the sale-certificate. He says, therefore, that, under section 260 of the Civil Procedure Code, this suit must be dismissed with costs.

The Moonsiff has found the facts in favour of the plaintiff, but has dismissed the suit upon the ground that he was bound to do so under section 360, and the Lower Appella'e Court has confirmed his decision.

The plaintiff now appeals on the ground that this was not a suit brought against "*the certified purchaser*" within the meaning of section 260, inasmuch as the defendant, at the time of the commencement of this suit, had not obtained the certificate, and he relies upon the judgment of the Privy Council (Mussamut Bahuns Koonwur *vs.* Lalla Buhoree Lall,* 14 Moore's Indian Appeals 524) to show that, where a case did not fall strictly within the terms of section 260, as for instance, where the real purchaser has obtained possession of the land, and the certified purchaser brings a suit to dispossess him, the courts ought to look to the rights of the parties, and section 260 does not apply.

With every disposition to do justice between the parties to this suit, we consider that this case does come within the meaning of section 260, and that this is a suit, to all intents and purposes, brought against the certified purchaser. It is true that the defendant had not obtained the certificate when the suit was brought, but he obtained it pending the suit, and he was the party to whom the Court was directed under section 259 to grant it. We agree, therefore, with the Judge of the Lower Appellate Court, and dismiss the appeal with costs.

* 18 W. R. 157.

The 28th June 1876.

Present:

The Hon'ble F. B. Kemp and E. G. B

Judges.

Special Appeal—Point of Law—Partition Adjudication of Right.

Case No. 2141 of 1874.

Special Appeal from a decision passed the Officiating Additional Judge Zillah Tirhoot, dated the 19th of 1874, reversing the decree of the tional Moonsiff of Mozufferpore, the 29th of August 1873.

Dursun Lall Chowdhry (Plaintiff), *Appell*

versus

Kashee Chowdhry, 1st party (Defend *Respondent.*

Mr. C. Gregory for Appellant.

Mr. R. T. Allan for Respondent.

Where a plaintiff and defendant both admitted that division of the property in suit had taken place; the plaintiff stated that one house was divided into two parts, of which he had come into one, and purchased second; and claimed adjudication of right to two-thirds and prayed that the house, which constituted the property in suit, should be pulled down; but defendant pleaded that the property consisted of three separate dwellings, and that the one which plaintiff claimed to have purchased had been built up by defendant; and had never been possessed by plaintiff, who had stood by and seen it erected; and the Judge, on appeal, had accepted the defendant's case and reversed the decision of the Moonsiff, who had given a decree for the plaintiff, and ordered two-thirds of the house to be pulled down, HELD by the High Court that no point of law was discoverable in this special appeal, which was accordingly dismissed.

[NOTE.—This case, though it decides that no point of law is raised in the appeal, is yet an interpretation of law in so far as it might rule that no point of law, making for a special appeal, is involved in the Judge's finding that plaintiff, having seen a dwelling grow up under his eyes, had thereby shut himself out from objecting to it.]

Kemp, J.—WE think this special appeal must be dismissed. The claim was for adjudication of right to, and recovery of possession of, two-thirds of a house, and there was a prayer in the plaint that the house should be pulled down.

Both parties admit that a division had taken place, but they are at issue as to the nature of the division, the plaintiff saying that the house was divided into three parts, the defendants that there were three houses.

The Moonsiff thought that the evidence given by the plaintiff as to the way in which the property was divided was more credible than the evidence given by the defendant. He was also of opinion that the plaintiff's possession and occupancy of the ancestral share, as well as his possession and occupancy of the purchased share, have been proved by the testimony of witnesses. He therefore gave him a decree, and ordered two-thirds of the house to be demolished.

On appeal, the Judge has reversed that finding. He is of opinion that the defendant has proved the partition set up by him. He is also of opinion that the defendant has clearly proved his title; that there is no evidence, either oral or documentary, that the plaintiff was ever in possession, or at all events within twelve years prior to the institution of this suit; and that he stood by and allowed this house to be erected by the defendant, which he now asks the Court to demolish. He therefore dismissed the plaintiff's suit.

We find no question of law in this special appeal. The appeal is dismissed with costs.

The 29th June 1876.

Present:

The Hon'ble Romesh Chunder Mitter,

Judge.

Partition—Joint Possession—Ancestral Property—Deed of Sale—Ex-parte Decree—Re-trial de novo—Re-service of Summons.

Case No. 387 of 1876.

Special Appeal from a decision passed by the Officiating Judge of West Burdwan, dated the 7th February 1876, reversing the decree of the Moonsiff of Bistoopore, dated the 6th August 1875.

Nobokristo Dey and others (three of the Defendants), *Appellants,*

versus

Chunder Sikhur Sircar (Plaintiff), *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Sreesh Chunder Chowdhry* for Appellants.

Baboo Golap Chunder Sircar for Respondent.

Where a plaintiff sued for recovery of possession of some land which he claimed to hold as his father's share of an ancestral estate which had been partitioned, but defendants contended that they had first leased it, and subsequently purchased it from a number of co-sharers who had been holding the estate jointly, having inherited it with plaintiff from a common ancestor; and the first Court found that there had been no partition, that the land in suit had not been allotted exclusively to plaintiff, that defendant No. 1 had come into possession in the manner described by him, and that the summons had not been served on defendants Nos. 2 and 3, who had not appeared, but the District Court found that the execution by plaintiff of the kobala filed by defendant No. 1, and his occupation of the land under a lease before purchase, had not been proved, and gave plaintiff a decree against all three defendants, HELD by the High Court that the District Court should not have decided the case on these two issues, but have found whether the land had actually fallen to plaintiff as his share in the manner alleged in his plaint; and that, in any case, a decree could not be given against the two absent defendants unless the District Court found that the summons had been served upon them.

The case was accordingly remanded for re-consideration of the issues, and for re-trial *de novo* if summons should have to be re-served.

THE plaintiff in this case sues to recover possession of a piece of land by removal of a wall, and by filling up a well, against three defendants, Nobokristo Dey, Khetternath Dey, and Kennaram Dey. He states in the plaint that the land in dispute originally belonged to one Bhagbut, his grandfather; that, by a subsequent partition between descendants of Bhagbut, the land in suit fell to the share of the plaintiff's father; that, after partition, the plaintiff's father and, after him, the plaintiff himself, had been in exclusive possession of this land till the date of dispossession.

The defendant No. 1, Nobokristo Dey, who appeared in the Court of first instance, alleged in defence that the land in suit did not belong to the plaintiff exclusively. He admitted that it was the ancestral property of the plaintiff and the other descendants of Bhagbut, but he denied the plaintiff's allegation that there was, at any time, a partition between the descendants of Bhagbut by which the land in dispute was allotted exclusively to the share of the plaintiff's father. He, in short, alleged that there was no partition, and the land, after the death of Bhagbut, belonged to the plaintiff and several other persons as co-owners. He further alleged that he held it as a lessee under all the owners, including the plaintiff, and in the year 1279 he and his co-sharers, the defendants Nos. 2 and 3, purchased it from the plaintiff and his co-sharers.

The Moonsiff found that the plaintiff's allegation that the land in dispute by partition fell to his father's exclusive share was not made out, but that the defence that it was held by the plaintiff and his co-sharers, and was leased out to the defendants, was established. The Moonsiff also found that the plaintiff and his co-sharers sold their proprietary right to the defendants. In short, the Moonsiff found all the issues of fact raised between the parties against the plaintiff and in favour of the defendant. Upon findings the Moonsiff dismissed the pla suit. But, as regards the defendants N and 3, he also found as a fact that sum was not proved to have been served them.

Against this decree the plaintiff prefe an appeal, making all the defendants pondents. In the Appellate Court the fendants, who were absent in the first C were also absent, and the defendant N appeared and defended the appeal. District Judge has decreed the plai claim. He has come to two findings of and upon them he has based his judg *first*, that the execution of the kobala b plaintiff on which the defendants rely not been proved; and, *secondly*, that th fendants' allegation that they held this before their purchase as tenants also ha been made out. Upon these two findin fact, he gave the plaintiff a decree.

In special appeal it has been conte that the findings of fact referred to abo not sufficient to dispose of the case in fa of the plaintiff. The special appe complains that the District Judge was b to come to a decision one way or an upon the question whether the land in di pute, as alleged by the plaintiff, was the e clusive property of the plaintiff's father, a after him of the plaintiff himself. It appe to me that this contention is well found and it seems that the District Judge has tried this important and necessary questi in this case under an erroneous impres on his part that it was an admitted f between the parties that, subsequent Bhagbut's death by some sort of division the land in dispute fell to the share of the plaintiff's father. He says: "The plaintiff, appellant, and the defendants (who attend), respondents, seem to be at one on the point that the lands of which the portion in dispute is a part originally belonged to one

Bhagbut, the plaintiff, appellant's grandfather, and that some division was made of the lands as originally held by Bhagbut between the contending parties in this suit or some of them." It seems, therefore, that he was under the impression that the parties agreed on this point that, by some sort of division between the parties, the land in suit was allotted to the share of the plaintiff. It is under that erroneous impression also, it seems to me, that he considered the kobala set up by the defendant was a document executed by the plaintiff alone. But, in point of fact, it was, as alleged by the defendant, a document purporting to have been executed by the plaintiff and his co-sharers. Be that as it may, it is quite clear that the plaintiff is not entitled to a decree without a finding in his favour that the land in dispute by a partition between the several descendants of Bhagbut fell to the share of the plaintiff's father, and the District Judge has not, as I have observed before, come to any finding upon this point. Therefore, upon this point alone, it would be necessary to remand this case to the Lower Appellate Court. But it has been also urged on behalf of two of the special appellants, namely, the defendants Nos. 2 and 3, that the District Judge was not justified in decreeing the plaintiff's suit against them in the face of the finding of the first Court that no summons was served upon them. I think that, upon this point also, the judgment of the Lower Appellate Court cannot stand. The Moonsiff distinctly found that question in favour of those two defendants, and it was one of the grounds upon which the suit was dismissed as against them; unless the District Judge came to a contrary finding upon this point, he would not be justified in awarding a decree in favour of the plaintiff against the persons who had no opportunity of defending the suit brought by him. On remand, the District Judge, therefore, will have also to consider whether upon the evidence he could come to the conclusion that summons was actually served upon these two defendants. It will be entirely in his discretion, if he finds that summons was not served upon them, either to dismiss the suit upon that ground, or to remand it to the Court of first instance, giving the plaintiff an opportunity of re-serving the summons. But in that case the whole case must be tried *de novo* in the presence of the parties.

With these directions, I remand this case to the Lower Appellate Court. Costs of this special appeal will abide the result.

The 30th June 1876.

Present:

The Hon'ble F. B. Kemp and Romesh Chunder Mitter, *Judges.*

Mitakshara Law—Rights of Minors—Partition—Joint Family Estate—Alienation—Lien protected in Partition.

Case No. 3207 of 1874.

Special Appeal from a decision passed by the Judge of Zillah Shahabad, dated the 26th August 1874, affirming the decree of the Subordinate Judge of that District, dated the 11th September 1872.

Mussamut Lekhraj Kooer, mother and guardian of Baboo Uger Narain Singh and others (Plaintiff), *Appellant,*

versus

Sirdar Dyal Singh who appeared, and Joy Perkash Singh who did not appear in this appeal (Defendants), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Doorga Mohun Dass for Respondents.

Under Mitakshara Law, minor sons have rights in ancestral property, for a declaration of which by partition their mother can proceed against their father and his creditors. Partition in such a case might be ordered

against the will of the father, without actually taking the property out of his hands. Even where sons, because of their minority, are incapable of signifying their intention of enforcing partition, it is open to a Court to discover whether there are special circumstances which would make a partition desirable.

Where a mother, in the interests of her minor sons, sued for a partition-order against the father of the minors and a creditor who, on a mortgage-bond, had obtained a decree against the father, whereby the interests of the minor sons in some ancestral property were imperilled; and the mother contended that the debts on account of which the decree had been obtained had been improperly contracted; and the District Judge had dismissed the suit, because this contention was not proved; HELD that, though the facts found settled the issue as to the propriety of the loan, and secured the creditor's lien on the entire estate, yet, in view of the decree obtained against the estate, and the danger of complications, which arose out of it, plaintiff was entitled to a partition-order, if only that the accounts of the minor's share, even as subject to the general lien, might be kept clear.

Mitter, J.—THIS suit for partition was brought by Mussamut Lekhraj Kooer, as the guardian of her minor sons, against the father of the minor, Baboo Joy Perkash Singh, and Sirdar Dyal Singh, a creditor and holder of a mortgage-security of the family-estate.

The plaintiff's allegation was that the mouzahs of which partition was claimed are the ancestral property of the minors and their father; that the defendant No. 1, that is, the father, incurred certain debts; and that, under the Hindoo Shastras, those debts were not binding upon the sons. The ground upon which the partition was claimed was specially the fact that the father had incurred those debts without any legal necessity.

It appears that the suit was first dismissed by both the Courts below upon the ground that, under the provisions of Act XL. of 1858, the mother was not entitled to maintain this action in behalf of her minor sons.

In special appeal, the judgment of the Courts below upon this point was set aside on the 13th of April 1874, and the case remanded for trial on its merits. Justice Phear, who delivered the judg says: "But it seems to us that the "asked for something quite different "this, it set up the right of the minor "as members of the Mitakshara fam "insist that the joint family-property "be divided. If, under the circumst "of the case, the minors had the ri "insist upon a partition, the partition "be effected without taking the poss "or management of the property out of "hands of the father or any other p "in whose hands it may lawfully be." estate being ancestral, under the Mitak Law, the sons ordinarily would be competent, even as against the will of father, to demand partition of it; but circumstances of this case are some peculiar. The sons here, not being maj could not signify their intention of enforc the partition against the will of t father. It was the mother who bro this suit on their behalf. And as we the remand-order, we think that it directed that it should be inquired whether there were special circumstanc in the case to justify a Court of Justice decreeing a suit for partition of this nat when brought by the mother on behalf her minor sons. On remand, the Lo Appellate Court, it seems to us, has not all kept in view this direction contain in the remand-order.

The District Judge, after finding that th plaintiff's allegation as to the alienation of the father not being justified by Hindoo Law is not made out, held that that was sufficient to dispose of the case against the plaintiff. He says that "it is not questioned "that the minors under the Mitakshara are "entitled to partition, and that this fact was "admitted both by the respondent and "appellant." But he is of opinion that

b

in ground upon which the plaintiff, her, came into Court to ask for , namely, that the father had con- ebts not sanctioned by Hindoo Law, made out, therefore the plaintiff's ld be dismissed.

ugh we think that this finding of favour of the defendant No. 2 suffi- protects his interests, still the facts nd admitted in this case seem to us would justify a Court of Justice a decree for partition of the joint estate. It is true that the allegation plaintiff, that the debts contracted he defendant No. 2 were not binding he joint family estate, was not made ll it appears that, upon the strength mortgage-deed which was executed father securing this debt upon the property, a decree has been obtained defendant No. 2. And the existence decree, it appears to us, is likely to about sufficient complications in the of the joint family to render it neces- r a Court of Justice for the purpose otecting the interests of the minors, er that their interests should be severed those of their father. We, therefore, that sufficient ground has been made by the plaintiff to justify an order for ion. The Lower Appellate Court d have made this order. But, at the time, it must be borne in mind that money due to defendant No. 2 has been blished to be a valid charge upon the e joint estate of the family. This ee for partition should, we think, in no affect the rights of the defendant No. 2 er the mortgage-deed. We, therefore, nd the case to the Lower Appellate rt, to effect this partition according to doo Law, and, at the same time, to make the decree due provisions for protecting interests of the mortgagee, the defendant . 2. As the plaintiff's case, as against the defendant No. 2, has entirely failed, she must pay his costs in all the Courts; but, on the other hand, as she has succeeded in making out her case against the defendant No. 1, she will be entitled to the costs of this suit in all the Courts from him.

With these directions, we remand the case to the Lower Appellate Court.

The 1st July 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Pre-emption — Right of Pre-emption — Antecedent Ceremonies—Secundum allegata et probata—Talub-i-isteshad.

Case No. 97 of 1875.

Regular Appeal from a decision passed by the Subordinate Judge of Zillah Bhaugulpore, dated the 8th of January 1875.

Surdharee Lall (Plaintiff), *Appellant,*

versus

Laboo Moodee, who appeared, and Mussamut Bibee Sahebah Jahan, wife of Syed Shah Yaseen *alias* Shah Bhattoo, who did not appear in this appeal (Defendants), *Respondents.*

Mr. Woodroffe and *Baboo Doorga Mohun Doss* for Appellant.

Mr. Ameer Ali and *Baboo Chunder Madhub Ghose* for Respondents.

The right of pre-emption cannot ordinarily be claimed in respect of only a portion of any property conveyed away in a single sale; but this rule holds good only when the property sold is one entire property. Where a single sale embraces two distinct properties, in respect of one of which a right of pre-emption resides in any person, who has not a similar right in regard to the other: HELD that it would be equally unreasonable to rule that he could claim both, and that he could claim neither, the only reasonable rule being that he could claim as much as he could take by a decree, if it were separately sold.

There are, however, certain ceremonies to be performed in order to lay a foundation for the establishment in a Court of law of a right of this kind, when it is menaced; and though, on the one hand, the effect of the omission to prove performance of these ceremonies is not cancelled by pleas advanced in later petitions put in during the progress of a case, just as, on the other, that omission is not, of necessity, evidence of a relinquishment of the right, yet, in this case, in which defendant had exhibited strange haste in some stages of the negociations, with the apparent purpose of forestalling plaintiff in his rights; but plaintiff's proceedings had been characterized with great negligence, if nothing worse; it was held that the plaintiff was not entitled to a decree.

THIS was a suit brought to enforce the right of the plaintiff to pre-emption in respect of a 3-anna share of Mouzah Mojahedpore, sold on the 6th August 1873 to the defendant by a Mahomedan lady named Sahebah Jahan, the plaintiff claiming the right on the ground that he was already a shareholder in the mouzah.

The plaintiff and defendant are both Hindoos, but it is admitted that, by custom, the right of pre-emption exists in this District.

The plaintiff is a Vakeel practising in the Courts of Bhaugulpore. In the year 1873, the defendant held a decree against Sahebah Jahan. The plaintiff was negociating with her for the purchase of her interest in this and other properties. The price was fixed, and a stamp was purchased by the plaintiff, and handed over to the agent of the lady, but she changed her mind, and determined to sell only a portion of her property. The negociations between her and the plaintiff were continued, and do not appear to have been formally broken off prior to the 25th of August, on which day the property [illegible] advertised to be sold in execution of [illegible] defendant's decree. The property was [illegible] ally put up for sale on that day, but the [illegible] was not proceeded with, and the next [illegible] ing the three-annas share of Mojahed[illegible] together with another property, were sold [illegible] the defendant for Rs. 17,000; and it is [illegible] reference to this sale that the plaintiff cl[illegible] his right of pre-emption as to Mojahedpo[illegible]

It has been objected that the plaintiff [illegible] not claim pre-emption in respect of one [illegible] tion only of what was comprised in the [illegible] to the defendant. This is, no doubt, so, [illegible] the property sold is one. But where, [illegible] the present case, two perfectly distinct [illegible] perties are sold, as to one of which [illegible] party has a right of pre-emption, and [illegible] the other not, it would be unreasonable [illegible] hold, either that he could claim both [illegible] perties, or that he could claim neither. [illegible] only reasonable rule seems to be that he [illegible] claim that property as to which his righ[illegible] pre-emption would attach, if it were [illegible] separately. No decision precisely in p[illegible] has been quoted, but had the law been o[illegible] wise it would scarcely have escaped obs[illegible] tion.

The only other question in the appeal [illegible] one purely of fact, whether the ceremo[illegible] necessary to lay a foundation for the cl[illegible] of pre-emption were duly performed. U[illegible] this point the judgment of the Subordi[illegible] Judge is not, in our opinion, satisfacto[illegible] He says: "It is alleged in the plaint th[illegible] "Mohib Singh, on behalf of the plaintiff, po[illegible] "formed the second demand or talub-i-is[illegible] "shad in Mouzah Hussungunge in the hou[illegible] "of Laboo Moodee, the vendee defendant. [illegible] "The witnesses for the plaintiff swear that the [illegible] "second demand was made at Mouzah Khari [illegible] "Chuck in the house of Mussamut *Biboo* [illegible] "Sahebah Jahan, the vendor. The principle of [illegible] "*secundum allegata et probata* would apply, [illegible] "and the case must be decided against the [illegible]

iff" (p. 6). The Subordinate Judge had t right to observe upon this error in the he effect of which is by no means got y a petition, which the plaintiff subse- put in, after all of the witnesses had xamined, asking to be allowed to it. But it would be wholly improper this as a question of pleading, and to of this suit, as the Subordinate Judge o think he might, upon the ground of parture in the evidence only. Nor think that there is any ground for that the plaintiff relinquished his of purchase. If the plaintiff had by his conduct on that day that he then wish to buy the property, it is se not at all likely that he really took o assert his right of pre-emption on llowing day. But the mere fact of bidding at that sale does not raise esumption. He had probably good s for believing that no sale would then ace. On the other hand, there seems eason to suppose that the defendant that the plaintiff was still desirous to se, for the sale to him was concluded ry early hour of the following morn- d a considerable sum of money was away in using the stamp which had reviously purchased, as above stated, the negociations with the plaintiff, hich was much larger than necessary. aste shows almost conclusively that a archaser was known to be in the field.

case has assumed a very serious from the circumstance that the effect of bordinate Judge's judgment is to charge laintiff with putting forward a case he knows to be false, and with ng his witnesses to give false evidence, rge of the most serious nature, and , if established, must produce the most rous consequences to the plaintiff.

e plaintiff has certainly taken a very rdinary course with regard to this litigation. The case is one in which it is obvious that not only his interest but his credit is at stake, and yet he did not choose to give his own account of transactions in which he was personally concerned. The Subordinate Judge was fully justified in treating this as a most unsatisfactory feature in the plaintiff's case. Probably it would have been wiser to exercise the power which the Subordinate Judge possessed of compelling the plaintiff to appear before him.

The position of the Appellate Court, in such a case as the present, with a judgment of the Court below, the reasoning of which it cannot altogether approve, is most unsatisfactory. Upon the whole, we have thought it desirable to take a course which we should by no means be willing to adopt in ordinary cases, namely, that of allowing the plaintiff to give his evidence in this Court.

That evidence has now been given, and we have most carefully considered it, as well as the evidence given in the Courts below, and the arguments of the learned Counsel who appeared for the plaintiff. We regret to say that we are still very far from having arrived at a decision which is clear and satisfactory to our own minds. With regard to the letter which was produced by the plaintiff for the first time when giving evidence in this Court, and which was challenged as a forgery, we do not think that that has been made out. It is a document which, taken by itself, is of the slightest possible use to the plaintiff, and it is extremely improbable that, if he went to the length of committing a forgery he would have fabricated a letter of this kind, or that, if he had done so, and afterwards determined not to use it, he would have allowed his witnesses to say anything about it at the trial, or have said anything about it himself in his examination before us. We are further confirmed in this opinion from the fact that the letter is without date, and con-

sequently is scarcely of any value as evidence upon the question, whether the necessary ceremonies were performed by the plaintiff *immediately* on receiving the information of the sale to the defendant.

With regard to the general facts of the case, although we are not prepared to say affirmatively, as the Subordinate Judge has done, that the plaintiff has suborned his witnesses to commit perjury, or that he has committed perjury himself, we are still bound to say that he has not convinced us that the ceremonies were duly performed. The plaintiff represents that after his claim to pre-emption was refused, he at once ordered a suit to be brought, yet no plaint was filed until a year afterwards. He explains this by saying that he left the management of the suit entirely to his servant, Byjnath, who in his turn explains the delay by saying that he was busy about other matters. A plaint was at last prepared, and was affirmed by the plaintiff, but, strange to say, he now declares that he did so without even reading it. He also says that he had no consultation with his pleaders in this case, and never saw them about it. Even on the day that he sent his agent to perform tulub-i-isteshad, he did not take the trouble to ascertain where it was that he had seen the parties. Knowing, as he did, that his demand would be refused, and that a suit would probably be brought, it is very strange that he did not make this inquiry. This carelessness and indifference on the part of a pleader, who is evidently an active and intelligent man of business, appears to us to be altogether unwarrantable. There is, further, the circumstance, already referred to, that the plaintiff did undoubtedly avoid, without a shadow of excuse, giving evidence in the Court below; and there are also discrepancies in the testimony of his witnesses, which are not altogether insignificant. On the other hand, the defendant has come forward and positively sworn that the ceremony was not performed. H testimony is short, but no special grou have been alleged why he should be d believed. There is also another circumsta which is not without some significance this part of the case. It has been pro beyond doubt that, sometime before institution of the present suit, but about t or three months after the defendant's purcha the money advanced by the plaintiff for purchase of stamp-paper was returned accepted by the plaintiff with an addit amount probably given by way of inte Ordinarily, a person in the plaintiff's posi anxious to assert his right to the prop sold would refuse to receive back money which might fairly be contended his part to have been advanced as earn money. Under all the circumstances, we not prepared to reverse the finding of Court below, and to give the plaintiff a dec We do not in the least disguise from o selves the unsatisfactory nature of our de sion in this case. But we consider that, this, the plaintiff himself is entirely to bla He had to establish affirmatively that cer ceremonies had been performed, and he failed to do so both in this Court and Court below. It was also his duty to hi self, as well as to the profession to which belongs, so to conduct himself as to prev a shadow of suspicion being cast upon character. We can only trust that experience he has now had will teach hi to be more careful in future.

We dismiss the appeal with costs.

The 1st July 1876.

Present:

Hon'ble W. Ainslie and E. G. Birch, *Judges.*

ncy Right—Doctrine of Merger—Adverse ession—Co-existence of Adverse Interests idence—Conduct of Party to Suit.

Case No. 1966 of 1875.

l *Appeal from a decision passed by Officiating Judge of Nuddea, dated 31st of May 1875, affirming the ee of the Sudder Moonsiff of that trict, dated the 29th January 1874.*

homas Savi (one of the Defendants), *Appellant,*

versus

nchanun Roy and others (Plaintiffs), *Respondents.*

oo *Mohinee Mohun Roy* for Appellant.

o *Doorga Dass Dutt* for Respondents.

ere a person, holding some land at first as a ryot, quently obtained a farming lease of it, and thus e assignee of the landlord's interests, and took tage of his position to allow himself to acquire a f occupancy as a ryot: HELD that the proprietor, termination of the farming lease, was entitled to he land back free of all encumbrances.

ough the doctrine of merger does not hold in ountry, and the same person may hold a piece of both as ryot and farmer distinctly, yet as the occupation is a possession adverse to that of the ord, it follows that in any case in which, in con- nce of the two interests being held by the same n, the landlord's will and restraining power, as st the tenant, are in abeyance, the ryottee right so so far in abeyance that it cannot undergo any ge until the landlord's rights are released from the dy of the tenant.

here a ryottee interest co-exists with a farming , the ryottee interest must remain unchanged in racter during the currency of the farming lease.

Where the conduct of a party to a suit is relied on evidence by the opposite party, and a Judge does draw the desired inference from it: HELD that, ther such an inference is *proper* or not, it is not a ssary one; and the omission of the Judge does not stitute an error of law giving the High Court power terfere in Special Appeal.

THE only point argued for the appellant by Baboo Mohinee Mohun Roy was that the Court below, having found that the defendant had occupied the land for twelve years, and that his occupation was originally that of a ryot, and continued to be of the same character, although he subsequently acquired a further interest as ijaradar in the estate in which his land lay, had erred in finding that the right of occupancy was barred by express stipulation.

This objection to the decision of the Lower Appellate Court is valid. The Judge had, in an earlier part of the judgment, held that "the double character of a ryot and an ijaradar is not inconsistent, it having been frequently ruled that the doctrine of merger does not apply in this country." In this he stated the law correctly, but he was in error in applying it to the case in hand.

The stipulation set out in a later part of the judgment is taken from the ijara lease, and was an agreement by the defendant as farmer, and not as ryot. It was a covenant for peaceable surrender of the farm, and the phrase, "on the expiration of the lease I shall not have anything to do with the land without a settlement," can only be taken to apply to the rights created by the lease; it has not been shown to us that there are any words in it importing an intention on either side to deal with pre-existing rights of the defendant as ryot, if there were any.

So far the judgment is unsound, but it still remains an open question whether the defendant has in fact acquired a right of occupancy. It was contended by the respondent under section 348 that the actual occupation of the defendant did not extend to twelve complete years, and that there is no evidence that there ever was a ryottee holding. On both these points there is a finding of fact by the Court below against him. On the first point, the finding

is clearly right; the notice to quit was in effect a notice to quit at the end of the cultivating season so as to allow a new tenant to enter from Kartik. On the other point, the finding might possibly be questioned in regular appeal; but, as it stands before us in special appeal, the question is this, was the Judge warranted, as a matter of law, in coming to the conclusion he has arrived at from the pottah granted by Ram Chunder Banerjee in 1267, in spite of the unfavourable inference to be drawn, and which the Moonsiff had drawn, from the suppression by the defendant of the subsequent lease granted by Doorga Pershad.

This is simply a question of value of evidence. The conduct of the defendant is relied on as evidence; the Judge declines to deduce therefrom the desired inference, and we have no right to say that that was or was not a *proper* inference. It cannot be contended that it was a *necessary* inference, and therefore there has been no error of law giving this Court power to interfere.

The cross-objection to the judgment of the Lower Appellate Court fails, but taking the facts to have been correctly found, we have to determine whether the right of occupancy claimed by defendant follows as the legal consequence of those facts.

The situation of the parties is somewhat peculiar. The defendant was from Kartik 1272 to Assin 1278 assignee of the landlord's interest under an ijara lease for six years. At the end of that time he did not quietly surrender the leased property, and consequently a notice was served upon him in Bhadur 1279, calling upon him to abstain from cultivating, and to vacate from Kartik of that year.

It seems to us that the defendant must be taken to have been holding over as farmer for this last year, so that he was in fact assignee of the landlord's interest up to the end of Assin 1279. He was therefore the person who had the power to terminate ryottee holding by virtue of which he claims, and so long as he remained as dleman, the landlord could not come deal directly with the ryots. It was thr his own forbearance that the present has grown up, and there can be no in allowing him to stand by idle in to create a right in himself adverse landlord, whose interest he as farmer bound to protect.

Granting that a ryottee interest exist with a farming title, I think it be held that the co-existing ryottee is the same in extent and quality end as at the beginning of the lease farm. Whatever may be the case other tenants as against the farmer the lessor has a clear right to have com sation for any change to his prejudice by him (the farmer), and this not merely way of damages, but by having the pr restored to its original state where practicable. Thus, if the defendant right of occupancy at the commence his farming lease, he cannot have acq one during its currency. This view law was taken by Mr. Justice Loch myself in the case of Mukundo Lall D *v.* Crowdy, 8 B. L. R., App., 95. This may lead to some difficult questions, but solution is unnecessary in the present ca for it is only by continuing the ryottee terest to the very last day on which farming title continued to exist that occupation of 12 years is made out. Bab Mohinee Mohun Roy contended that, un section 6, Act VIII. of 1869 (B. C.), right of occupancy is not limited by proviso, save that mentioned in section 7 but that it comes into effect absolutel the moment 12 years' continuous occupatio as ryot has been completed. But then th question is, what is meant by occupation a ryot. I, in effect, held, in the case cited, and

old that it means an occupation which, a subordinate, is in a sense adverse to ndlord so far as it qualifies his power aling with the land at will. Where is practically no restraint of the land- will, in consequence of the will and estraining power being in the same n, there can be no opposition (in the ed sense intended above) to the land- uch as is inherent in the holding of a and while this state of things lasts the e right is so far in abeyance that it t undergo any change in its character. think the appeal should be dismissed osts.

The 3rd July 1876.

Present:

Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

of Redemption—Consideration—Usufruct tisfaction of Lien—Foreclosure of Mort- e— Conditional Sale— Limitation— Con- of Parties—Cause of Action.

Case No. 8 of 1875.

ar Appeal from a decision passed by Subordinate Judge of Sarun, dated 15th September 1874.

heikh Toujjoh Hossein and others (Plaintiffs), *Appellants,*

versus

loo Singh and others (Defendants), *Respondents.*

Woodroffe and *Baboo Kally Kishen Sen* for Appellant.

r. C. Gregory and *Baboo Chunder Madhub Ghose* for Respondents.

re plaintiffs claimed equity of redemption in re- , and sued for recovery of possession of, proper- de over by their predecessors in title to the an- of defendants, pleading that the properties had nveyed under a zur-i-peshgee lease, defendants' tier which had been satisfied by usufruct; but nts contended that the properties had originally been conveyed away without reservation, and that their right in them had been upheld in earlier decisions given in the presence of the plaintiffs' predecessors, FOUND that, in a previous suit brought by plaintiffs, the claim advanced by them was inconsistent with that now advanced; and HELD that, in view of their conduct, and the earlier decisions obtained by defendant's ancestors as proprietors, the suit must be dismissed.

The fact of a revenue officer, in resumption-proceedings, having released lands on the ground that they formed portions of a parent estate which had been assessed under the decennial settlement, is no proof that such lands were at any time regarded as rent-free.

THE plaintiffs Nos. 1 to 11 are the heirs or successors of Sonaoolla, the former proprietor of the villages of Debcha and Koondu. The plaintiffs Nos. 12 to 14 are purchasers from the other plaintiffs of a nine-anna share of the land in dispute, with the mesne-profits. The suit, which was instituted on the 10th of March 1874, is to recover possession of 87 beeghas 18 cottahs and 19¾ dhoors of malikana lakheraj land (after deducting the share of Sheikh Sukawut Hossein, the *putteedar* of a 1 anna 9 pul share of the said land) by redemption of a zur-i-peshgee deed, dated the 4th of February 1842, the said mortgage having been fully satisfied from the usufruct of the hypothecated properties, leaving a surplus of Rs. 11,494-15-5 pies due to the plaintiffs. The suit is valued at Rs. 32,276-3-5 pies. The cause of action is said to have arisen at the end of Jeyt 1272 F. S.,* or the date of satisfaction of the zur-i-peshgee.

The plaint states that there are two distinct and separate classes of land in Mouzahs Debcha and Koondu, one called dihee mokurruree, the other malikana lakheraj; that the malikana lakheraj lands, *i. e.*, the lands which are the subject of this suit, were let in zur-i-peshgee to the ancestors of the

* A. D. 1865.

defendants Nos. 2, 3, and 4, and that the dihee mokurruree lands were conditionally sold to the defendant No. 1; that, owing to non-payment of the consideration of the conditional sale, the mortgage was foreclosed, and the lands styled dihee mokurruree passed into the possession of defendant No. 1, and are still in his possession; that, as regards the lands in dispute styled malikana lakheraj, a case between the plaintiffs and the Government under Regulation II. of 1819 had been pending on appeal before the Special Commissioner who, on proof of the malikana lands being lakheraj, released them to the plaintiffs, and they were declared to be rent-free. The plaint proceeds to state that, in December 1860, the ancestor of the defendants Nos. 2, 3, and 4, the zur-i-peshgeedar of the malikana lands, sold his ticca zur-i-peshgee rights to the defendant No. 1, who, by the purchase, became the representative of those rights, and is in possession of the said lands in that capacity. The zur-i-peshgee advance under the deed dated the 4th of February 1842 being Rs. 822 has been paid from the usufruct, leaving a surplus of Rs. 11,494-15-5 pies, as per account annexed to the plaint. The prayer of the plaint is, that possession of the disputed property, together with the surplus proceeds appropriated by the defendants, may be awarded to the plaintiffs.

The defendant Sheikh Dost Mahomed, who appears to have purchased from the defendant No. 1, in his written statement, contends that the suit is barred; that the disputed lands are not rent-free or lakheraj lands, but that they form part of the rent-paying mokurruree lands; that the zur-i-peshgee relates to 74 beeghas 13 cottahs 5 dhoors comprised in five plots, the claim therefore to redeem lands in excess of that area is liable to dismissal; that the vendor of the defendant purchased the entire 16 annas of Mouzahs Debcha and Koondu, of which villages the disputed lands f a part; that no lands of any description excluded from the said purchase; that question has been adjudicated upon in the sence of the plaintiffs or their ancestors decisions and written statements, the respe dates of which are given, and that the is therefore barred under section 2 of VIII. of 1859; that the possession Moulvie Athar Hossein, the father of defendant No. 1, over the zaraet and ruree has been for upwards of 12 y as proprietor and not as mortgagee; and this fact was established by a decision Court dated the 27th of July 1870. reference to the merits, the defendant that the ancestor of the plaintiffs called zaraet lands "malikana," but that no lands are rent-free, and that the pl iffs have no sort of right left to them the two villages of Debcha and Koon that on the 21st of December 1860, father of the defendant No. 1 paid the c sideration of the zur-i-peshgee deed (w the plaintiffs seek to redeem) by reason purchase of the proprietary right, and in the capacity of mortgagee. Then, reference to the claim of the plaintiff account of mesne-profits, it is urged that annual proceeds did not exceed Rs. 125.

The written statement of the heirs of original zur-i-peshgeedar will be found page 13 of the printed book. They that they have no concern in the suit, have been improperly made defendants, ask for their costs. The written statement the defendant No. 1 is much to the same effe as that of his vendee, the defendant Do Mahomed. The decision of the Subordinate Judge, Mr. W. DaCosta, is dated the 15th September 1874, and for the reasons given in that decision he dismissed the plaintiff's suit with costs. No oral evidence was recorded in this suit, and it was admitted in argument that our decision must turn upon the construction

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of the documentary evidence filed by the parties.

The contention between the parties, stated briefly, is this: The plaintiffs contend that there were two classes of land in the villages of Debcha and Koondu. The first class they describe as malikana lands, the second as mokurruree lands; that the malikana lands were given in zur-i-peshgee for a consideration of Rs. 822 to the ancestors of the defendants Nos. 2, 3, and 4, and the mokurruree lands were sold conditionally to Abdool Lateef, the defendant No. 1, which conditional sale was subsequently foreclosed, and that the right of the plaintiffs to any and all of the mokurruree lands is no longer vested in them, but in the defendants, but that, with reference to the malikana lands which form the subject of this suit, they (the plaintiffs) are entitled to redeem them, as the mortgage has been satisfied from the usufruct, and a large surplus is due to them. The defendants, on the other hand, contend that the disputed lands are not malikana lakheraj lands, as described in the plaint, but zeraet lands, forming part and parcel of the two villages of Debcha and Koondu, and not distinct and separate lands, and that they have purchased the proprietary right in these lands, and do not in any way represent the rights of the original zur-i-peshgeedars of the plaintiffs. The plaintiffs mainly rely upon the document dated the 8th of February 1842. The defendants, upon the three documents, dated respectively the 8th January 1853, 30th June 1855, and 5th July 1855, and upon certain proceedings and decrees of Court, which will be alluded to hereafter.

Before giving our opinion upon the proper construction to be put upon these documents, we desire to make a few observations upon the conduct of the plaintiffs, as well as upon the early history of the two villages Debcha and Koondu.

With reference to the conduct of the plaintiffs, we find that they first applied for permission to sue *in formâ pauperis*. Their application is dated the 11th March 1870. They then claimed 66 beeghas 9 biswas 19 dhoors 13¾ ruttees out of 74 beeghas 13 biswas 6 dhoors 6 ruttees, being the zur-i-peshgee property, and 11 beeghas 11 biswas 12 dhoors ¾ ruttees out of 13 beeghas 5 biswas 13 dhoors 7¾ ruttees, not included in the zur-i-peshgee. In the account of the gross proceeds of the two villages appended to the said application, it is stated that the zur-i-peshgee or amount advanced was paid off in 1266 F. S., and that a surplus accrued from the year 1267 F. S., corresponding with 1860 A.D. In the present suit, the application to sue *in formâ pauperis* having been rejected, they sue for 87 beeghas 18 cottahs 19¾ dhoors out of 98 beeghas 15 cottahs, and in the statement of the gross proceeds of the two villages they state that the zur-i-peshgee was paid off in 1271 F. S., corresponding with 1864 A. D. So that there has been some inconsistency in the claims made at different periods, and very great and unexplained delay in instituting the suit, assuming, as the plaintiffs do, that their cause of action accrued from the year in which the mortgage was satisfied from the usufruct.

In regard to the early history of the two villages, we find that the earliest proceeding in which mention is made of them is dated the 16th of March 1801. The ancestor of the plaintiffs, namely, Sonaoolla, appealed to the Provincial Court of Patna. Sonaoolla had claimed the two villages as his mokurruree. The Court found that the appellant, Sonaoolla, had granted a farming lease of the two villages to one Nasir Mahomed Khan, who was directed by the decree to execute a kubooleut to the appellant, Sonaoolla, in respect of the two villages. The kubooleut of Nasir Mahomed Khan has not been filed. The next document in chronological order is a *ticca pottah* executed by Sonaoolla, dated the 24th

of September 1802, granting a lease for a term of three years to one Kishen Pershad Roy of the two villages, with the reservation of sayer cesses, and other cesses, which are detailed, and the rent-free and malikana lands. The next deed is a kubooleut executed by Bhinuk Rai, dated the 25th January 1816, to the heirs of the aforesaid Sonaoolla. In this deed there is a recital that the malikana lakheraj and pashban jageer lands prohibited by the Government are excepted, and not included in the lease, which was for a term of four years. The next document is a copy of a decision of the Moonsiff of Pursa, Zillah Sarun, dated the 19th of January 1837. In this suit one Gon was plaintiff, and the principal defendants were Rahim Alli and others, heirs of Sonaoolla, and Dina Singh was described as zur-i-peshgee-holder. The suit was for possession of a 1-6th share by partition of the entire 16 annas of Mouzah Debcha. The suit was defended by Rahim Alli and others. The zur-i-peshgeedar did not appear. The plaintiff's suit was dismissed. After the lapse of some years, it appears that the Revenue Authorities took measures to resume the two villages, and a measurement was made with a view to re-assess the lands comprised therein. In the measurement-papers (copies of the abstract being filed) it appears that the lands of the two villages were classed under two heads, mokurruree and malikana, the latter being assessed at a somewhat lower rate than the former; but in the khusra measurement the latter class of land were described as zeraet, that is, land in the direct cultivation of the maliks as distinguished from the lands in the direct occupation of ryots. Temporary settlements were concluded with the plaintiffs' ancestors for the mokurruree lands, and with their zur-i-peshgeedar, the ancestor of the defendants Nos. 2, 3, and 4, for the remaining lands, calling them malikana or zeraet. On the settlement-proceedings being submitted for the sanction of the Collec[illegible] he directed that a map should be drawn, [illegible] fining the position of the malikana or [illegible] land in each of the two villages, and [illegible] was done. Subsequently, the whole of [illegible] proceedings of the Revenue Authorities [illegible] reviewed by the Special Commissioner in [illegible] peal, and on the 27th of August 1847, [illegible] directed the release of the whole of the [illegible] in the two villages, not as stated [illegible] the plaint on proof of the malikana [illegible] being lakheraj, "but because the mo[illegible] ruree tenure of the two villages had [illegible] included in decennial settlement of the pa[illegible] pergunnah, and that it would be a bre[illegible] of faith on the part of the Governme[illegible] re-assess the lands comprising the moku[illegible] ree tenure." So much for the early hi[illegible] of the two villages; and before dismi[illegible] it from our consideration, we may re[illegible] that to none of the proceedings det[illegible] above were the defendants in this suit par[illegible] with the single exception of the suit be[illegible] the Moonsiff, in which the plaintiffs' [illegible] peshgeedar was made a *pro-formâ* defen[illegible] but in which suit he put in no appearanc[illegible]

We now come to the deed dated the [illegible] of February 1842, upon the terms of wh[illegible] the plaintiffs mainly rely as supporting th[illegible] claim to redeem. This document is a counte[illegible] part of a zur-i-peshgee lease for a term of fi[illegible] years granted to Salim Singh, Jhum[illegible] Singh, and Saha Singh, represented in th[illegible] suit by the defendants Nos. 2, 3, and 4, by th[illegible] heirs of Sonaoolla, represented in this su[illegible] by the plaintiffs. The deed recites that th[illegible] lessors are the proprietors and mokurrureedar[illegible] of Mouzahs Debcha and Koondu, Pergunnah[illegible] Barvil; that 74 beeghas 13 cottahs 6 dhoors as per plots detailed at foot of the deed, and described to be malikana lands, were leased on a payment to the lessors as zur-i-peshgee of Rs. 822, the lessees to pay the Government revenue, Rs. 78-11-2 pie, and to enjoy the usufruct; that on the

expiry of the lease in 1253 F. S., the lessors would repay the amount advanced and release the malikana lands, and in default pay rent, the lessees to continue to hold possession, paying the Government revenue until the money advanced was paid off, all gains and losses to be borne by the lessees. The share of Sheikh Sukawut Hossein was not included in this lease, and was distinctly excepted. The plaintiffs have also deducted that share from their claim in the present suit. Mr. Woodroffe, who appears for the plaintiffs, appellants, contends that it is immaterial whether the land covered by this lease be called lakheraj malikana, lakheraj zeraet, or by any other designation, inasmuch as a certain quantity of land, which the then proprietors of the village of Debcha and Koondu dealt with as malikana lands, was reserved, and not included in the zur-i-peshgee lease, and that the defendant No. 1, if he has purchased anything, has purchased, not the proprietary right in the lands covered by this deed, but the zur-i-peshgee right of the defendants Nos. 2, 3, and 4, who represent the original lessees; and therefore that defendant No. 1 stands in the shoes of the lessees, and plaintiffs are entitled by the terms of the deed of February 1842 to redeem the lands covered by it.

Mr. C. Gregory, who appears for the defendants, respondents, on the other hand, contends that the whole of the lands of the two villages of Debcha and Koondu were mokurrurce; that there were no separate malikana lands, and that the entire lands of the two villages without any reservation beyond cesses not authorized by law have passed to him by the deeds dated in the margin; * and that he paid the consideration of the deed of the 4th February 1842 by reason of his purchase of the proprietary rights, and not in the capacity of mortgagee. Mr. Gregory further relied on certain proceedings of the Civil and Criminal Courts, which we shall notice hereafter.

No. 1, 6th January 1850, p. 90.
No. 2, 30th June 1855, p. 97.
No. 3, 5th July 1855, p. 101.

The three deeds alluded to above are not disputed. They were executed by the ancestors of the plaintiffs, or by parties through whom the plaintiffs derive title. The first deed, dated the 8th of January 1853, was executed by Sheikh Velayet Hossein, the grandson of Sonaoolla, the party referred to in the early history of the case. It recites the execution of a previous conditional sale of a 4-annas share out of 8-annas share in the entire 16 annas—the original runs thus: "Mouza-oo-tumamee"—of the two villages, Debcha and Koondu; that steps had been taken to foreclose the mortgage under the provisions of Regulation XVII. of 1806; that an absolute sale is concluded of 4 annas out of 13 annas 16 gundas in the entire 16 annas of Mouzah Debcha and Koondu, which are held in mokurruree, with the exception of items prohibited by the law. The second deed, dated the 30th June 1855, is executed by other heirs of Sonaoolla, and is to the same effect as the first deed. The third deed, dated the 5th of July 1855, is executed also by the heirs of Sonaoolla, the ancestors of the plaintiffs, on the same terms, with this slight difference that what is excepted is described as "lands endowed according to the Mahomedan Law."

It seems to us unnecessary, for the proper decision of the case, to refer to the proceedings of the Revenue Officers, for the two villages were released by the Special Commissioner on the footing that they had already been assessed as mokurruree villages at the period of the decennial settlement, and were not liable to further assessment. The Revenue Officers may or may not for fiscal purposes have divided the lands comprising the two villages into two or more

classes, but there is nothing in those proceedings to show that any portion of the lands were dealt with as malikana lakheraj lands as alleged in the plaint. On the contrary, the khusras show that a small area in each village was measured as zeraet, or in the direct cultivation of the then maliks of the village.

It seems clear that the deed of the 4th of February 1842, to Salim, Jhumuck, and Saha, who are represented by the defendants Nos. 2, 3, and 4, reserved certain lands, as per defined plots, which were subsequently mapped out by order of the Collector. It is further clear that the three deeds, upon which the defendant No. 1 relies, convey absolutely, without any reservation, the two mokurruree villages of Debcha and Koondu. It is also admitted that the defendant No. 1 has paid off the consideration, namely, 822 rupees, for which the zur-i-peshgee lease of the 4th of February 1842 was granted, the original lease having been returned to him. We may here state that the kubooleut or counterpart of the lease is filed by the plaintiffs, and the lease by the defendant. What we have to decide therefore is whether the plaintiffs are entitled to redeem the mortgage of the 4th February 1842. We are of opinion that the plaintiffs are not entitled to redeem, and that their suit has been properly dismissed. The defendants have admittedly been in possession for many years of the entire village of Debcha and Koondu. On a dispute arising, the villages were attached by the Magistrate under the provisions of Act IV. of 1840, and were subsequently released to the defendants, who also received back from the Collectorate the whole of the collections made by the Revenue Authorities prior to the release of the two villages by the Special Commissioner. In the deeds conveying the two villages to the defendants, no land of any description whatever is reserved. It is also clear that, in the year 1859, the defendant No. 1 brought a in the Moonsiff's Court against Velayet sein and others, the ancestors of the pl iffs, or parties through whom they d title, for confirmation of possession o beeghas 3 biswas of land in Mouzahs D cha and Koondu. The plaintiff in that defendant in this, claimed *as propri* The defendants in that suit claimed lands, or a large portion of them, as "zer Amongst the points at issue as settle that case, we find the following: "W ther the zeraet alleged by the defend was deducted from the sale," that is, in the sale to the defendants by the ance of the present plaintiffs, the Moonsiff fo that the whole of the mouzahs were without the exception of any portion lands, and that the defendants had not pro their allegations, and that, the lands b included in the deed of sale, the plaintiff entitled to a decree. It appears to us the decision finally disposed of the que as to whether the lands which the pla now claim as malikana lands, but which already shown, were zeraet lands, were cluded or not from the deeds of sale to defendants. It may be said that there nothing to establish the identity of the beeghas 3 biswas of land claimed in the in 1859, with the land claimed in the pre suit, but, apart from the area being alm the same, namely, 88 beeghas 3 biswas the former, and 89 beeghas 18 cottahs 19 dhoors in the present suit, the plaintiffs d not allege, nor do they show, that these are any other lands but the lands which they now choose to call malikana, but which, in fact, were zeraet lands, which could possibly have formed the subject of the suit in 1859, and for which the defendant No. 1 obtained a decree in their presence, confirming his possession in his *proprietary right.* Then, in 1860, we find a suit brought by the zur-i-peshgeedars Salim, Jhumuck, and Saha, an-

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of the defendants Nos. 2, 3, and 4, the defendant No. 1 in this suit, and intiffs or parties through whom they . All the defendants were removed the category of defendants by a peti- with the exception of the defendant Abdool Lateef, who compromised the th the zur-i-peshgeedars, and got back ginal lease.

affirm the decision of the Subordinate , and dismiss this appeal with costs le by the appellants.

The 5th July 1867.

Present :

Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

for Account—Profits and Expenses—Part- ship—Income-tax Return—Stamp Duty— solution of Partnership—Special Appeal— ntract.

Case No. 2731 of 1874.

ial Appeal from a decision passed by e Judge of Zillah Sarun, dated the th of June 1874, modifying the decree the Subordinate Judge of that District, ated the 21st May 1873.

Buddun Sahu and another (two of the Defendants), *Appellants,*

versus

Rampertab Sahu (Plaintiff), *Respondent.*

essrs. R. T. Allan and *R. E. Twidale* and *Baboo Jodoo Nath Sahoi* for Appellants.

Moonshee Mahomed Yusuf and *Baboo Boodh Sen Singh* for Respondent.

Where a plaintiff sued for an account of profits and expenses, claiming a share in trade-transactions carried on in partnership with defendants under a contract; and defendants denied partnership; but plaintiff obtained a modified decree in the first Court; and the second Court, going upon the contract, which it held to be proved, gave plaintiff a decree for more than he had claimed, HELD by the High Court that, since partnership had been established, and dissolution of partnership at any subsequent period falling within the period referred to in the plaint had not been proved, partnership must be taken to be established, and plaintiff must get a decree; yet the decree cannot give plaintiff more than he claimed.

A plea raised by defendant to the effect that, as plaintiff sued on a plaint with a stamp of only Rs. 25, he could not get more than an amount for which a stamp of that value would be sufficient was not decided on its merits, because it was ruled that plaintiff could not get more than he claimed, and that amount was covered by the stamp:

HELD also that the plea raised by defendant that, under s. 242 of the Contract Law, plaintiff had no right as a partner could not be allowed for the first time in special appeal.

Kemp, J.—THE defendants are the special appellants in this case.

The plaintiff sued for an account of profits and expenses of trade connected with the gola at Mahomedpore from the year 1278 to 1279 F. S., and for the recovery of an approximate amount of Rs. 2,495. The cause of action is said to have accrued in the month of Kowar 1280 F. S., the date on which the defendants declined to render the account. Then the plaint goes on to state that the sudder gola of the defendants is at Mahomedpore, and that there is a guddee of trade at Revilgunge; that the plaintiff was admitted into partnership with a view to carry on the business, and that he was to have a three-annas share in the profits as a consideration for his labour; and that since Kowar 1278 F. S., the plaintiff has been carrying on the

business in the capacity of a co-partner and as a gomashta in behalf of the other defendants.

The defendants, in their written statement, state that they never entered into any written or verbal contract with the plaintiff in respect of his being taken as a co-partner; that the plaintiff was a salaried servant, and was never a partner in the business; and that his allegation of partnership was false. Then they go on to say that the plaintiff had embezzled money, and had brought a charge of unlawful confinement against the defendant; and that the case was dismissed; that, when the defendant was about to sue him for bringing a false charge, the present suit was brought; and that in fact no gola, shop, or any trade whatever was carried on by the defendants in the years 1278 and 1279.

The Subordinate Judge found on the evidence that the plaintiff was taken into partnership in the year 1274, and that he remained a partner till 1279, and, with reference to the amount claimed, he was of opinion that it was excessive; and that in equity it ought to be reduced. He then found with regard to the documents filed by the plaintiff that the profits of the concern in the year 1278 were 9,000 rupees, and in 1279, 1,546 rupees. He came to this conclusion on reference to the income-tax return, and therefore awarded to the plaintiff Rs. 1,687-8, being a three-annas share of the profits in 1278, and Rs. 289-14 being a share to the same extent of the profits in 1279, or in all, the sum of Rs. 1,977-6.

Both parties appealed. The plaintiff filed a cross-appeal under the provisions of section 348 of the Civil Procedure Code, objecting to that part of the decision of the Subordinate Judge which refused to award the plaintiff the sum of Rs. 517-10, being the difference between the sum claimed in the plaint, namely, Rs. 2,495, and the su Rs. 1,977-6, the sum awarded by Subordinate Judge. The defendants ap ed on the whole case. The Judge affirmed the decision of the Subord Judge, and has also found that the pl has made out his case, namely, that he a partner from 1274, and that he is en to an account of the profits and expen the years 1278 and 1279, being the for which the account was asked. reference to the amount the plain entitled to, he has amended the decisi the Subordinate Judge, and have awarde sum of Rs. 3,000, being Rs. 1,022-10 in e of what was awarded by the Subord Judge, and nearly double of what asked for by the plaintiff in his c appeal.

The grounds taken in special appe the defendants are that, as there is no all tion in the plaint that the plaintiff w partner in 1278 and 1279, there is no fo tion for the present suit; and, reference to the cross-appeal, that it b on a stamp of 25 rupees only, the pl ought to have been considered as ha limited his claim to the amount for w that stamp would be sufficient; in o words, that he was not entitled to an a of more than the difference between was awarded by the Subordinate Judge what was claimed in the plaint.

As to the first ground of special app we think it is clear, from the wording of plaint, that the plaintiff does not state th he was taken into partnership in 1278, b that his partnership commenced at an earli date, and that from Kowar 1278 he wa vested by the defendant with the power of carrying on the business in the capacity of co-partner and as a gomashta on behalf of the other defendants. Both the plaintiff and the defendants were examined in the

first Court, and their evidence clearly proved to the satisfaction of the Subordinate Judge that the partnership commenced in 1274. It has been pressed upon us in special appeal that it does not follow that, because the plaintiff was a partner in 1274, he was a partner in 1278 and 1279. It has not been shown us that the partnership was dissolved, and there is evidence which satisfied both the Courts below that the partnership existed in 1278 and 1279.

Mr. Allan, for the special appellant, raised the point that, under section 242 of the Contract Act (IX. of 1872), the plaintiff has no right as a partner, and that he cannot sue. But, as that objection was not taken either before the Judge or in the grounds of special appeal, it cannot be allowed to be raised in this stage of the case.

Then, with reference to the second point, it appears to us clear on referring to the petition of cross-appeal that all that the plaintiff appealed to the Judge about was that the Subordinate Judge had not awarded him Rs. 517-10, that is, the difference between the sum claimed in the plaint and the sum awarded by the Subordinate Judge. We think that the Judge was wrong in increasing the claim of the plaintiff, and therefore modify that part of his decision by declaring that the plaintiff is entitled to the Rs. 1,977-6 awarded by the Subordinate Judge *plus* the Rs. 517-10 covered by his cross-appeal. With this modification the decision of the Judge is affirmed, and the special appeal dismissed with costs in proportion.

The 1st July 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Bond-debt—Second Attachment—Second Execution—Mortgage-lien—Declaration of Right—Security—Limitation—Alienations pending Attachment.

Case No. 107 of 1875.

Regular Appeal from a decision passed by the Subordinate Judge of Zillah Midnapore, dated the 11th January 1875.

Musst. Matonginy Dassee, widow of late Surroop Narain Mytee, and guardian of her minor sons Bholanath Mytee and Tarucknath Mytee, and of her minor daughter-in-law Nobincoomary Dassee, widow of her late son Troyluckhonath Mytee (one of the Defendants), *Appellant,*

versus

Chowdhry Junmunjoy Mullick (Plaintiff), *Respondent.*

Baboos Umbica Churn Bose and *Bhobany Churn Dutt* for Appellant.

Baboos Kally Mohun Dass and *Mohiny Mohun Roy* for Respondent.

Where some property was pledged as security for a loan, but proceedings in execution on foreclosure were stayed by mutual agreement, and a second attachment was subsequently obtained, but a fresh encumbrance was created on the same property by the owners pledging it in another transaction before the original creditor completed his proceedings in execution; and it appeared that there were reasons for a renewal of proceedings in execution, and that this renewal of proceedings was not accidental, HELD that the original creditor's title dates from the latest attachment of the property, and that, as that went before the second creditor's lien, this lien could only be satisfied after the satisfaction of the first creditor's claim.

It was suggested by the Court that the property should be sold, free of all encumbrances, at an upset price equal to the amount of the original creditor's claim; and that both creditors should be satisfied out of the proceeds, the first taking precedence over the second.

Where a property is released from attachment, and the person at whose instance attachment was made is not debarred by the order of release from proceeding with his execution, his suit is virtually a suit for a declaration of right, and not merely a suit for setting aside the order of release; and the rule of limitation applicable to his case is not in s. 246 of the Civil Procedure Code, which would allow one year, but in cl. 15, Sch. II. of Act IX. of 1871.

The mere validity of a prior attachment does not render null and void alienations made while it is pending.

Markby, J.—The 29th May 1876.—In this case it appears that certain immoveable property was pledged to the defendant Matonginy by one Bipro Prosad Mytee on the 17th December 1861. On the 29th August 1863, Matonginy obtained a decree for the money due under the bond. In February 1864 the property pledged by the bond was attached by her, but not sold. On the 25th November 1865, it was again attached. On the 17th January 1866, a joint petition was put in by Matonginy and the judgment-debtor, stating that six months' time had been granted by Matonginy, and asking that proceedings in execution might be stayed during that period, the property remaining under attachment. On the 20th January, the Court, apparently of its own motion, thought proper to strike off the execution-proceedings, upon what grounds we are unable to understand. On the 10th January 1868, another advance of money was made to Bipro Prosad Mytee by the plaintiff in this suit on the security of the same property. On the 29th September, Matonginy again applied for execution in the usual form, and the usual order for attachment was issued on the 30th June 1868. On the 29th September 1869, part of the money having been paid upon the joint application of both parties, the execution-proceedings were ordered to be "struck off for the present," the attachment being continued. On the 7th January 1870, Matonginy desired to take up the execution-proceedings at the point where they had left off, that is, t applied for an order for the sale of the p perty without any further proclama But, not acceding to this, the Court in e ordered that execution-proceedings shou commenced, and that, upon payment of t proper fees by the petitioner, fresh proces attachment would issue. These fees b paid, the execution went on; the prop which had been pledged was put up to a and was bought by Matonginy herself.

The plaintiff's security was in the n of a bond specially registered, and that bond the plaintiff also took out ex tion on the 22nd February 1871, and p for the sale of the same property. M giny put in an objection to these proceed and, on the 24th June 1871, the Court the order set out at page 19, by which, effect, without deciding anything as to rights of the parties, the Court directed property to be released upon the ground the plaintiff had not at that time his m gage-lien declared. The plaintiff t brought this suit, making Matonginy the son of Bipro Dass Mytee (who is de parties (defendant), and he asks that his to sell this property in order to realize money due to him should be declared. W he has got is a declaration that the defen ant Matonginy is purchaser only of su rights as remained in the mortgagor at the time of the sale, in other words, that she pu chased the property subject to the plaintiff lien. It was also apparently intended the lower Court, though it is not expres so said, that the property should be sold execution of the plaintiff's decree.

Before we come to consider the ma question, we will dispose of two preliminary objections. It was objected that the order of 24th June 1871, releasing the property from the plaintiff's attachment, was an order under section 246 of the Code of Civil Procedure; and that this being a suit to set

aside that order must be brought within a year from the date thereof. The matter is now governed, not by the rule of limitation laid down in section 246 itself, which is repealed, but by clause 15 of Schedule II. of Act IX. of 1871, which, however, only applies to suits brought to set aside the order, and not to suits to establish the right. Now, this is not a suit to set aside the order. The plaintiff does not ask this in his plaint, nor is it necessary for him to do so. That order is no impediment to the plaintiff's proceeding with his execution if the declaration of his lien therein mentioned be obtained, and the present suit was in effect brought to obtain such a declaration, and has been so far successful. This objection, therefore, in our opinion, cannot prevail.

The other objection is that the plaintiff having obtained this security whilst the property was under attachment, it is null and void under the provisions of section 240 of the Code of Civil Procedure. This is a question which was much considered by the Privy Council in the case of Puddoomonee Dassee *vs.* Roy Mothooranath Chowdhry, reported in 12 B. L. R. 420.* We think that that decision has laid down the principle which is applicable to this case, and that we are bound to apply it. It is to be observed that the person seeking the benefit of the section was there, as here, the execution-creditor, who had purchased in execution of his own decree, and (to use the expression of the Privy Council) the question there, as here, was from when did his title under his purchase date? Upon this point the Privy Council say: "It seems to their Lordships that generally, when the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment." We have no doubt that the second attachment is there mentioned as being the most recent. In this case the most recent attachment is that of January 1871, and therefore we think that, if Matonginy was in this case compelled to take out another execution, then her title should be presumed to date from that attachment. It has, however, been urged that Matonginy was not in January 1871 compelled to take out another execution, but we think she was. She desired to go on with her old execution-case, but the Court, by not acceding to this, and by ordering against her wish that the execution-proceedings should be commenced anew, did, in effect, compel her to take out another execution. It is said that we ought to consider whether the Court was right in so ordering. But we think not. If the defendant, Matonginy, wished to raise that question, and desired to make her title date from an earlier attachment, she should have appealed against the order to take out fresh proceedings; not having done so, we consider that she cannot question it now. It is quite possible that she may have considered it dangerous to insist on her right to proceed on the old execution, for the validity of one at least of the prior attachments has in fact been questioned, and it has been held by the Court below to be invalid. For ourselves we greatly doubt the correctness of the view taken by the lower Court upon this point, and we are not prepared to say that this attachment could now be questioned upon the ground of the irregularities suggested, but we use this as an illustration to show what reasons the defendant Matonginy may have had for the course adopted by her, and that it was not, as suggested by the pleader, a matter of indifference to her upon which attachment she proceeded. We therefore hold that, even assuming the prior attachment to have been valid, we cannot hold that alienations made pending it were absolutely null and void as between the plaintiff and the defendant Matonginy.

* 20 W. R. 133.

This brings us to the question, what are the rights of the parties? We have already pointed out in a case somewhat similar (23 W. R., p. 338) what we consider to be the effect of the Full Bench decision reported in that volume, and of a judgment-creditor purchasing in execution the property pledged to himself. The only difference between the two cases is that here the second encumbrance was created after the first encumbrancer had obtained a decree, but (as we must now take it) before attachment. We do not think that serves to distinguish the case from the decision of the Full Bench which proceeds upon the principle that the decree cannot affect persons who are not parties to it. The plaintiff, therefore, the second creditor, can assert his lien, and can have the property brought to sale, but only upon condition that he redeems the property by paying the prior creditor Matonginy her principal, interest, and costs, or (what will be better for all parties) if plaintiff and defendant Matonginy join in an application for the purpose, the property may be at once ordered to be put up to sale clear of both encumbrances. The purchase-money will then be applied first to pay off the defendant Matonginy, and then the plaintiff. The case can be mentioned again when the form of the decree can be settled, and further directions given as to taking any accounts that may be necessary.

The 1st July 1876.—Our order in the case will be that an account will be taken of what is due to the defendant Matonginy Dassee for principal, interest, and costs under her mortgage, and when that account shall have been taken, the property will be sold by the Court below in the same manner as property is sold in execution of a decree, at an upset price of Rs. 2,100. The property will be sold clear of both the plaintiff's and defendant's encumbrances. The money arising from the sale will be applied as directed in the judgment of this Court, that is, it will be applied first to pay off the defen Matonginy, and then the plaintiff.

We think that each party ought to his own costs.

The 3rd July 1876.

Present:

The Hon'ble W. Markby and W. F. McDonell, V.C., *Judges.*

Suit to set aside Lease—Cross appeal—Q fication of Lease—Reversionary Int Mundullee Lease—Risks of Collection— justment of Rents—Violation of Rig Declaratory Decree—Consequential Re Acquiescence.

Case No. 385 of 1876.

Special Appeal from a decision passed the Judge of Midnapore, dated the February 1876, reversing the decre the Officiating Moonsiff of that Dis dated the 3rd September 1875.

Ram Needhee Koondoo (Plaintiff), *Appell*

versus

Rajah Rughoo Nath Narain Mulloo others ((Defendants), *Respondents.*

Mr. Woodroffe and *Baboo Bhowany Churn Dutt* for Appellant.

The Advocate-General, the Legal Rem brancer and *the Senior Government Pl* for Respondents.

Where a zemindar, who, being largely indebted to person, had granted him a farming lease of the zemin ree, subject to the two-fold qualification—(1) that his versionary interest in the property should not be injur by the lease which abandoned to the lessee the power making agreements with the tenants and collecting re during the term of the lease, and (2) that the amount the malgoozaree should not be altered during that term but a clause in the farming lease allowed the zemin dar six months to adjust his rent-roll so as to show th mofussil jumma of Rs. 35,000; and it was contended that the pottah, which this suit was brought to set aside, merely embodied the terms of the adjustment which the zemindar was thus empowered to make, FOUND, *firstly*, that the transaction referred to as an adjustment was really the fixing of a new rent rather than an adjustment of the old; *secondly*, that it had not taken

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ring the time specified, namely, between the n of the lease and its taking effect; *thirdly*, zemindar, unable, within the specified time, to rental to be Rs. 35,000, had afterwards been uring, by collusion with tenants, to raise the the requisite pitch for the purpose of escaping he penalties incurred under his agreement; y, that plaintiff was entitled to treat these collu- eements as violations of his rights; and, *fifthly*, aintiff had not been shown by acquiescence in e granted to defendant to have shut himself out sputing its validity; and HELD that, though the ought in this case was virtually a declaratory and the Courts were precluded from giving such e except in cases in which consequential relief low out of it, yet that, inasmuch as the leases to defendant came between plaintiff and the and practically destroyed the relation of land- ch he had acquired, he was entitled to a decree, as accordingly given.

his case the plaintiff sued to set aside ah executed by the late Rajah Bikram- Kollah in favour of one Sorup Mohato. nfant son of the Rajah and the lessee the pottah were the defendants in it. The first Court gave a decree set- side the pottah. The lessee-defendant ot appeal, but the minor did, making ssee a respondent. The plaintiff also led. The second Court set aside the e given by the first Court and dismissed it. The plaintiff then appealed to this making both the original defendants ndents.

ere is no dispute as to the main facts of ase. The late Rajah, on the 22nd Feb- 1872 (12th Falgoon 1279), being y indebted to the plaintiff granted an of his zemindaree to the plaintiff, for ars, to commence from the ensuing year and to end in 1294. Subsequently, on 9th Sraban 1280, that is, after the lease been several months in force, the pottah granted, which it is now sought to set . A great number of similar pottahs been granted, covering, we believe, y the whole estate.

ere can be no doubt whatever that r the ijara the plaintiff, from the time the ijara-term commenced, and whilst that term lasted, was and is the only person capable of granting a valid lease to tenants, or making any valid arrangement as to the collection of rents. The zemindar has granted to the plaintiff for 14 years his zemindaree "together with the rights." There is nothing to show that the zemindar intended to retain to himself the power of making any settlements with the tenants or the munduls during the term; on the contrary, it is expressly said: "You have during the term power as complete as my own to make settlements in the said zemindaree." The only qualification added being that these settlements shall not be injurious to the Rajah's reversionary interest. It would require very clear words to qualify this express power, and there are no such words in the documents.

The pottah in question recites that the mouzah to which it relates was formerly in the possession of defendant No. 1 under a mundullee settlement for a term of years; and that a fresh jote-mundullee settlement was thereby granted for 15 years from 1280 to 1294. The position of a mundul on this estate is stated to be that he collects the rents from the ryots and pays the landlord the rate fixed by the pottah, taking all the risk of collection upon himself, in return for which he gets a profit out of the collections. The pottah further stipulates that the malgoozaree, or amount payable to the zemindar, shall not be increased or decreased during the time. This is a stipulation which the Rajah had no power whatever to make.

Indeed, the Legal Remembrancer, who appeared in this Court for the minor defendant, has expressly abandoned the right to interfere between the ijaradar and the tenants; and much unnecessary litigation might have been saved if this abandonment had been made earlier.

It is, however, argued for the minor defendant that the late Rajah did not, by granting

the lease, assume to exercise the power of making settlements with the tenants generally, but that, by one of the clauses in the ijara lease, he was allowed six months to adjust the rent-roll so as to show a mofussil jumma of Rs. 35,000; and that, in pursuance of this understanding, the rent of the defendant Sorup Mohato was adjusted within the time specified, and that the pottah granted to this defendant merely embodies the terms of the adjustment.

The answer to this is two-fold: *Firstly*, what is here called the "adjustment" did not, in fact, take place within the time specified. The time specified in the ijara lease was the six months' interval between the execution of the ijara and its taking effect. *Secondly*, the Moonsiff has found that what was done was not any adjustment of the old payment, but the fixing of a new payment, and this finding remains undisturbed; to which may be added that the clause which this pottah contains, prohibiting future enhancement, cannot possibly be called "adjustment." The District Judge says that there is no difference between what was done before and what was done after the plaintiff entered into possession under his ijara. There is this important difference that, after the ijara commenced, the Rajah could not deal with the estate at all; before it commenced he could deal with it, provided he did not interfere with the rights of the ijaradar under the ijara. The District Judge also says: "All the pottahs have the same object, *viz.*, to show what rent each lessee was to pay from the commencement of the ijara. And it seems to me that it would be unreasonable and even absurd, under the circumstances, to hold that the Rajah, having failed to show the rent-roll of Rs. 35,000 by the last day of 1279, was, therefore, precluded from ever showing it at all. The result, under the terms of the ijara lease, as pointed out by the Counsel, who argued the case for the appellant, would be to leave plaintiff in full enjoyment of the estate, to allow him to collect from it as much as little as he chose, while the R would be bound to make good any all deficiency in the yearly rental of Rs. 35,0 together with 12 per cent. interest. No C should, I think, give its authority to such an inequitable arrangement would tie up the Rajah's hands, and him over to the mercies of a creditor, grasping propensities are sufficiently in the terms of the ijara which he has cuted. That document is drawn in the interest of the creditor, and the C will not add any extra strength to his tion under it by holding that the Rajah precluded from proving the stipulated roll at all if he did not succeed in doi by the close of the year 1279." The deed the face of it, does not justify the obse tions here made. If the arrangement the Rajah made was an imprudent must be because of some extraneous cir stances, and not by reason of the form the provisions in the lease itself, which not shown to be other than such as a cre desirous of obtaining security might rea ably require. Indeed, no charge of this appears to have been made on behalf of minor defendant in the Court of the Moo siff. This impression on the District Judge mind seems to have been created by disastrous consequences to the Rajah his successors which he supposes to res from the plaintiff's construction of the strument. These consequences are, howev for the most part imaginary. The plaint does not express any wish to assume, could he assume, the position which th District Judge supposes. He could not, the District Judge says, "collect as much or as little as he chose." If the plaintiff took possession at all, he would be obliged, before claiming for any deficiency, to show

that he could not, with reasonable diligence, have collected more than he had done from the tenants of the estate.

It was, however, said that, even if the Rajah had no power to make this settlement, either as zemindar or under the clause of the ijara lease requiring him to show a mofussil jumma of Rs. 35,000, still this suit would not lie; that in this view the pottah sought to be set aside was a nullity; that it had not yet been set up against the plaintiff; and that he had been in no way injured by it.

With regard to the question of injury, there is no finding in this case that the plaintiff has as yet suffered any actual injury for which he could have claimed compensation in the way of damages. But we entirely dissent from the argument on the part of the minor defendant that the making of this pottah was beneficial to the plaintiff, or that it was executed with the object that it should be so. It is admitted now that the Rajah could not, at the end of the six months, show a rental of Rs. 35,000. By granting pottahs to the tenants similar to the one in this case, he tried to raise the rental to the required amount, hoping thereby to escape the penalties which he incurred under the ijara lease. There can be little doubt that he prevailed upon the tenants to accept this advance on the old rents by offering them some kind of advantageous provision in the pottah granted. In the present case the advantage held out to the tenant was that his rent should not be increased during the term. We think the assertion contained in the pottah that it was granted for the purpose of effecting a mokabilla was a mere pretence, and rather a shallow one. We think this is what is meant by collusion in the plaint, and that to that extent it is (as found by the Moonsiff) established by the evidence.

It also seems to be clear that, although the right to make settlements with the tenants after the ijara term commenced is not now asserted on behalf of the minor defendant, the plaintiff, upon coming to know that the pottahs had been granted after that time, had a right to treat such a proceeding as a violation of his rights under the ijara, which, in my opinion, in fact it was. On the other hand, it was never expressly admitted in this case that this pottah was a nullity until the close of that argument in this Court. It was, in the first instance, submitted to the Court to say whether it was or was not a valid document. Subsequently this attitude was departed from, and the validity of the pottah was strenuously asserted and maintained. The grounds upon which its validity was maintained have now been overruled.

Nor, as far as the minor was concerned, was any objection raised in the first Court to the suit being tried. On the contrary, Mr. Harrison said: "If the pottahs granted to the ryot and jote-munduls be held by the Court as contrary to the conditions of the ijara pottah, and be on that account set aside, I have no objection thereto. But the ijara pottah which has been granted to the plaintiff is not an ordinary ticca ijara pottah, and it is, therefore, difficult to give a reasonable interpretation to it. I therefore pray that the Court will be pleased to take into its consideration the under-mentioned facts, in ascertaining what interpretation it is necessary to give to the plaintiff's ijara pottah in order to pass a judgment on the pottahs granted to the ryots and jote-munduls." In all probability Mr. Harrison thought it convenient for the minor that the question should be once for all determined.

It is also admitted that a very large number of pottahs have been granted under circumstances similar to the present, the validity of all which is in dispute, and must be determined in some way or other. It

is certainly desirable that the power of the Rajah to grant these pottahs should be discussed and determined before the plaintiff takes proceedings against the tenants. There is every probability that, when this point is finally decided in one case, it will not be again litigated.

We advert to these circumstances to show that there are reasons why it is desirable to give in this suit a decree which will declare the rights of the plaintiff and the minor defendant, respectively, and why it would be a hardship now to hold that the suit does not lie. We cannot, of course, give a decree, however desirable it may be, in this particular case, if the law does not permit us to do so.

It is now the settled law that, in the Courts of this country, "no suit can be brought for a declaratory decree except in cases where consequential relief is capable of being had either in the same Court or, in certain cases, in some other" (15 B. L. R. 106). But in laying down this rule we do not understand it to have been the intention of the Privy Council to deny to the Courts of this country the power to grant decrees in any case in which, independently of the provisions contained in section 15 of Act VIII. of 1859, these Courts have power to grant a decree. It is therefore necessary to see what that power is. Now in this Court the power is generally the same as that of the Court of Chancery in England. That was the power of the Supreme Court, and it is continued to this Court. And I do not think there is any valid ground for holding that the Courts of the Mofussil have a jurisdiction in this respect different from, or less than that of, this Court. At any rate, in the absence of all special provision or authority upon the subject, it would be difficult to suggest any other guide than the practice of the Court of Chancery in England; and, according to the best information we are to obtain, the Court of Chancery in Eng would, in such a case as this, entertain suit. The cases in the Privy Council support this view. In a case decided March 1874, a plaintiff alleging himself be in possession obtained a decree to aside a deed executed by a deceased p in favour of the defendant. The pla claimed to be the heir of the deceased; defendant who was in possession claim hold the property under the deed. Privy Council say: "The plaint prayed the deed might be set aside, which is a p for substantive relief." In another case the Privy Council said, speaking claim of the plaintiff in that suit: "requisition of a declaration of a nul by setting aside the false bromuttar alleged by the defendant, is really more than this, that he should have title, whatever it was, as a zemindar, from the allegation of the defendant they had some other title. If he had ap to set aside a deed set up by the defe impugning his ordinary title as a zemi then relief might be granted to him cancelling that deed, but he cannot ob relief in the shape of merely setting a an assertion, an assertion which, for that appears, may have been merely by wo of mouth" (2 L. R., Ind. App., 85).

In a case reported in 10 Moore 438, Privy Council deals with the case of a ten of a portion of a zemindary who set against the zemindar a holding different fro that which was his true holding, and seems to be considered that *this* w an interference with the zemindar's possession, for which a suit would lie. At p. 449 their Lordships say: "If this tenure be not interposed between the zemindar and the cultivators, the ordinary relation between him and them exists, but, if it be interposed, the zemindar's general pro-

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y title to the collections is gone, and of it he is simply entitled to some from the mesne-proprietors. It is s, then, that the assertion of such a a serious prejudice to a zemindar, may materially interfere with the suc- management of his zemindary. Such ermediate tenure cuts off the posses- that is, the zemindar's title to the rents profits immediately derived from the tors." In an earlier case in the volume, the facts were somewhat similar present. A zemindar, after granting plaintiff a lease of his zemindary, notices to the tenants not to pay the to the lessee. No other interference the rights of the lessee appears to have place, and no actual refusal to pay rent s to have been alleged. The High gave a decree declaring that the ff was entitled to specific performance lease, and to the possession and enjoy- of the zemindary under the terms of ease. The Privy Council did not e of the declaration as to the specific nance, but affirmed the rest of the .

se cases appear to us to justify this in making a decree in this case. This of the case is wholly independent of question whether the dahi and waste have been included in the pottah, the siff's finding as to which has been oned by the plaintiff. In the view we take of the case, any further inquiry that question is unnecessary. It was ed by the parties that we should give opinion upon the general question, and ave done so.

e also think that no question of iescence as raised by the cross-appeal s in this case. It was not raised by issues, and no facts have been found ch would justify us in saying that the ntiff has, by acquiescence, shut himself out from disputing the validity of the pottah. The result is that the plaintiff is entitled to a decree. He has not asked for any injunction, though probably he might have done so, and only asks that the pottah should be set aside as against him. We think a decree substantially to that effect may be made. The decree of the Lower Appellate Court dismissing the suit will, therefore, be set aside, and instead thereof there will be a decree in the following form: that the pottah of 29th Srabun 1280, granted by the Rajah to the defendant No. 1, be, as between the plaintiff and the defendants in this suit, set aside, and the plaintiff declared entitled to the possession and enjoyment of the zemindary under the terms of the ijara lease of the 12th Falgoon 1279, the aforesaid pottah notwithstanding.

The plaintiff is entitled to his costs in all the Courts; those in the first Court will be paid by the defendant No. 1 and by the guardian of the infant jointly; those in the second Court and in this Court by the guardian of the infant.

The 4th July 1876.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, V.C., *Judges.*

Decree based on Compromise—Limitation—Adverse Title—Performance of Contract— Immoveable Property—Diluvion— Alluvion—Reformation—Personal Promise—Limitation of Benefit—"Compass Map."

Case No. 324 of 1874.

Regular Appeal from a decision passed by the Subordinate Judge of Zillah Moorshedabad, dated the 29th of August 1874.

Mr. C. G. D. Betts and others (Defendants), *Appellants,*

versus

Mohamed Ismael Chowdhry (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Sree Nath Doss* for Appellants.

Baboo Nullit Chunder Sein for Respondent.

Appeal valued at Rs. 4,875.

A suit for recovery of possession of land, based on a compromise effected in the course of previous litigation between the parties, is not a suit for specific performance of contract, but a suit for "immoveable property," and would be covered, not by s. 113 of the Schedule to the Limitation Act, but by s. 145.

In a suit for recovery of possession based on an agreement to surrender possession, the possession of defendants at the time when they made the agreement to deliver over the land to the plaintiff, cannot be taken as hostile to the plaintiff, but can only be considered adverse to plaintiff from and after the date of the agreement by reason of defendants' refusal to carry out the promise.

Where the plaintiff was a farmer and the character of his lease had been changed, because it had been renewed by the superior landlord since the first agreement had been made between him and defendants, defendants could not regard their agreement as a personal promise relating only to the plaintiff in his original character as lessee, if it was through defendants' failure to surrender possession, that plaintiff was not in possession at the time of the renewal of his lease: the rule being that the zemindar must be taken to have renewed the lease on the understanding that it would cover all that plaintiff could hold under previous lease.

In such a case limitation of benefit could only arise from specific terms in the agreement restricting the promise to plaintiff personally.

"Compass map" generally means the revenue surveyor's map.

THE plaintiff in the present suit is the ijaradar of 8 annas of Turruf Gopalpore containing certain villages mentioned in the plaint. He sues the defendants for the recovery of 2,000 beeghas of land on the basis of a ruffanama, or deed of compromise, between the parties in a former suit. The former suit came up to this Court on appeal, and was registered as No. 444 of 1866. On the 26th April 1867, the appeal was removed from the file in consequence of the compromise effected. The plaintiff states that the defendants afterwards refused to act up to the terms of the compromise. He thereupon sought to sue out execution of his decree in that suit, but, on the 29th Nov ber 1869, the Subordinate Judge held a fresh suit on the compromise was nec sary, and that nothing could be done execution of decree. He accordingly brought this suit against the present ap lants and against his lessors, the zemin of Gopalpore.

The defendants pleaded limitation, took several other objections. Their st ment of the facts was, that they them held the lands in suit under an ijara those lands having been leased to them belonging to Rughoobaty and other villa that, at the time of the recent deara-su the zemindars caused these lands to be veyed and mapped as parts of Rughoo and other villages to which their lease re and that consequently they have a title to hold them against the plaintiff, w title is also derived from the same zem dars.

The lower Court has made a decree favour of the plaintiff, after deducting co numbered plots, and has directed that "boundaries of the villages should be ac "tained from the thak-map of 1856 "with the record, and that possession "be delivered with the assistance of "thak-map of Gopalpore for 1856 "the survey-map of that mouzah for 185 The defendants have appealed from th decree.

The first ground taken is that this is properly one governed by article 173 the second Schedule of the Limitation Ac in that it is a suit for specific perfor ance of a contract. The Court below h held that the article which really govern the suit is the 145th, the suit being fo possession of immoveable property, or an interest therein not otherwise specially pro vided for.

Now, it is quite clear that this is a suit for possession of immoveable property, and

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the words "not otherwise specially vided for" refer to suits for possession ch property, and not to suits generally, r specific performance of contract which come under article 113.

was then said that granting that it does come under article 113, it will come r article 143, and in that case the od would run from the date of dispos-on. On the facts of the case, it appears s immaterial whether the suit is governed article 143 or article 145. It was, we k, rightly found by the Court below the zemindars were in possession up he time when the land was cut away the action of the rivers. This appears have been between the year 1265 and 8. In 1269 land re-formed on the same and in 1270 it was fit for cultivation, was then adversely occupied by the ndants. But even if it be supposed the defendant's occupation extends back 269, in which year the land first appear-in any shape after having been destroyed the river, the period of 12 years would have run out when the suit was insti-d. At the same time we think that cle 145 is the one which really does ly to this case, and that this being a on an agreement to surrender posses-n, the possession of the defendants at the e when they made the agreement to iver over the land to the plaintiff cannot taken to be hostile to the plaintiff, but n only be adverse to the plaintiff from d after the date of the agreement by son of their having refused to carry out t promise.

The next point pressed upon us was that e deed of compromise filed in the former it does not contain any promise to put e plaintiff in possession of particular lands, less it be some 1,600 beeghas of land form-g the jote of Khosal Mundul. We have d this agreement translated, and we think that the reasonable interpretation and the only possible interpretation, considering the circumstances under which it was made, is that the defendants then consented and agreed to put plaintiff in possession of the alluvial lands of Gopalpore according to the thak-map. No doubt, the terms there used were, "We consent to demarcate the alluvial "lands of Gopalpore according to the com-"pass map;" but it is not to be supposed that the mere defining of boundary between the lands of the plaintiff and the defendants was all that was meant, or that it was intended that they should show to the plaintiff that certain lands belonged to him, but at the same time retained them in their own possession.

Then it was argued that this was a promise to the plaintiff personally so long as he should remain in possession as ijaradar, and that his lease having expired in 1273 he cannot now claim the benefit of that promise, seeing that he holds under a new lease taking effect from the year 1274. We think that the answer to this is that, if the defendants now carried out their agreement, the plaintiff, at the expiry of his lease in 1273, would have been actually in possession of the land which he was entitled to hold under that lease, and that the lease renewed to him by the zemindars must be taken to have been renewed on the understanding that it covered the same lands which he would have been entitled to hold under the previous lease. There are no words in the deed of compromise which show that it was intended to limit the benefit of that promise to the plaintiff personally. His right to sue accrued to him as the representative of the zemindars, and we think that the benefit of the decree must enure to the zemindars.

The appellant further contended that as both the plaintiff and the defendants are lessees of the same zemindars, if the zemin-

dars chose to alter the designation of the lands and describe the lands which formerly belonged to Gopalpore as part of Rughoobaty, they were at perfect liberty to do so; and, when they leased the lands to the defendants as lands of Rughoobaty, they must be taken to have passed to them the whole of the land they chose to call Rughoobaty.

The lease under which the defendants now claim is of 1279. The deara-survey, in which the designation of the lands was either through mistake or otherwise changed, was made in 1867 or 1274, and the lease to the plaintiff was given in the year 1273, taking effect from the beginning of the year 1274. Therefore it was no longer in the power of the zemindars to do anything which should take away part of what they had already leased to the plaintiff as belonging to Gopalpore, or to lease the same lands over again to the defendants or any one else by having them described as part of Rughoobaty.

Lastly, a question was raised as to the meaning of the terms "compass map" in the deed of compromise. On this point the Subordinate Judge says: "The map which "the ruffanama speaks of and describes "as compass is either the map prepared by "the Ameen in that case, or the thak-map "of 1852. But the two maps exactly cor-"respond. It is perfectly immaterial, there-"fore, to which of these two it alludes." It may be further observed that, in addition to the thak-map of 1852, there was a map made by the professional Government surveyor in 1253, which also corresponds with the other two. There is no doubt that the expression "compass map" is ordinarily used in this country to designate the Revenue surveyor's map; but, any how, it is for the defendants, who raised the objection, to show that some other map does exist to which reference could possibly have been made. But, as a matter of fact, there is not the slightest trace of any map which m have been referred to in the ruffanama m the description of "compass map," exc the thak and survey maps of 1852 or 1 or the map which the Judge speaks of the Ameen's map, all of which agree their definition of the land. Under th circumstances, we think that this appeal m be dismissed with costs.

The 4th July 1875.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Encroachment—Probability of Injury—B dary—Removal of Obstruction—Onus of P —Period of Grace.

Case No. 2274 of 1873.

Special Appeal from a decision passed the Officiating Additional Judge Zillah 24-Pergunnahs, dated the 28th June 1873, affirming the decree of Moonsiff of Alipore, dated the 24th July 1872.

Judoonath Mullick (Plaintiff), *Appellant,*

versus

Kalee Kristo Tagore (Defendant), *Respondent.*

Mr. Evans, and *Baboos Nil Madhub Bo* and *Jadub Chunder Seal* for Appellant.

The Advocate-General (Mr. Paul), Mr. Woodroffe, Baboos Kalee Mohun Doss and *Doorga Mohun Dass* for Respondent.

Where two persons occupied land on two sides of khal, in which one of them threw up a retaining wall, for the removal of which, as an obstruction, the other had brought a suit, and the High Court had held that plaintiff had a right to get the obstruction removed, even though no immediate injury to plaintiff accrued from it, but considered it necessary that the case should be remanded in order that the lower Court should ascertain the precise extent of the encroachment: it was found, on the return of the case to the High Court, that, though the exact extent of the encroachment had not been ascertained, there was yet evidence enough on record to enable the Court to infer what was the extent

and direction of the encroachment; and HELD that an order should issue on defendant to remove the obstruction.

Where a dispute arises regarding the direction of a boundary which one of the parties to a suit has demolished, and the other party proves its general direction, the onus of proof that the direction is wrongly stated, if it be so, lies on the former, who removed the boundary.

In this case, in consideration of the season of the year when the order was made, a period of grace was allowed to carry out the order.

WHEN this case first came before us on the 14th May 1874,* we observed that the Judge had found as a fact that there was an encroachment, but that it was not established that damage to the plaintiff's property must necessarily result from that encroachment, and, on the hearing of the appeal, we came to the conclusion that it was necessary to determine the extent of the encroachment; for on the authorities cited it appeared to us that the probability of further damage was a matter not necessary to be considered, and we therefore ordered that the case should be remanded to the lower Court for a finding as to the extent of encroachment made by the defendant. The lower Court has now sent up its finding, and this finding appears to be based entirely upon the evidence of Neelmonee Mitter. The plaintiff stated that the encroachment extended to 170 feet in length and 10 feet in width. The Judge has found that it extends to 5 feet in width. He has not found to what length it extends, but we are able, on inspection of the plans that form part of the record, to make an order which will put an end to this long litigation. The conclusion of the Judge is inconsistent with the facts found by him. It is in these words: "He," that is, the witness Neelmonee Mitter, "says that at the "point B on the map D, and *at this point* "*only*, has there been any encroachment on "the bed of the khal. The amount of this "encroachment he states to be 5 or 6 feet, "consequently the wall, instead of running "from Q to B, should take the direction of the "dotted line (in a marginal sketch) where C is "5 feet below B. I therefore find that, on the "evidence, there has been an encroachment "on the bed of the khal of 5 feet, that this "encroachment has taken place at the point "B, and B only." It appears to us that, if the wall be altered as proposed by the Judge, so as to take the course of the dotted line, the point B will be left precisely, as at present, 5 feet beyond the proper line. This conclusion of the Judge is, therefore, a nullity. In an earlier part of his judgment, referring to the evidence of Neelmonee Mitter, he says: "This "gentleman has built the new wall, and con-"sequently is in the best position to point "out the relative position of both walls. "His character has not been impeached by "either side. He states that, at the point "marked B, on the map D, the new wall "encroached 5 or 6 feet, while at C, instead "of encroaching on the bed of the khal, it is "actually from 5 to 6 feet south of where "the old wall stood." The consequence is, that, to give proper effect to this evidence which he declares to be trustworthy, a line will have to be drawn from a point 5 feet to the south of B to a point 6 feet to the north of C as represented on the map marked D. The objection taken to this was, that the witness Neelmonee had stated in his evidence that the old wall ran in a zig-zag direction, and therefore we were not at liberty to connect these two points by a straight line. Now, as to this objection, the sufficient answer is, we think, that given by the plaintiff's Counsel, that, in a case of this kind, where the defendant himself had obliterated the old boundary-marks, it is sufficient for the plaintiff to show the general direction of the old wall, and if any deviation is relied upon by the defendant, it is for him to give precise proof of it. In the absence of any such proof in this case the finding arrived at by the Judge on the

* 22 W. R. 73.

evidence of Neelmonee Mitter is, we think, a sufficient finding, and one to which effect must be given. The consequence will be that we must declare that at the point B the outer face of the wall stands 5 feet to the north beyond where it should be, and taking a point 5 feet to the south of this, that point must be connected with the face of the wall at Q, and this line must be extended eastwards up to a point 6 feet to the north of C; the point of intersection of this line with the present wall-face will show the length of the wall of the defendant eastward of the point Q, which requires to be removed. On a reference to the maps, it would appear that there is some slight difference between the map prepared by the Ameen and that made by Messrs. Burn & Co., marked D, so that we are not able to say, at the present moment, what the exact length of the encroachment is; but it is sufficient for the disposal of this appeal to say that, according to scale, it appears from these maps that the projecting portion constitutes a triangle with a base which cannot be less than 15 feet, and may be 21 feet or thereabout, and an altitude, as found by the Judge, of 5 feet. Taking this to be a sufficient approximation to the extent of the encroachment, we think that the case falls within the principle of the case of Bickett and Morris, on which we relied. In that case Lord Chelmsford, citing the judgment of the Court below, says at page 55: "Neither can any "of the proprietors occupy the *alvèns* with "solid erections without the consent of the "other, because he thereby affects the course "of the whole stream. The idea of com-"pelling a party to define how it will operate "upon him, or what damage or injury it "will produce, is out of the question;" and he goes on to say: "These views appear to "me to be perfectly sound in principle, and "to be supported by authority." Then, again, we find in Lord Cranworth's judgment at page 59: "It is unnecessary for us to "speculate on any such infinitesimal obst "tion (*i. e.*, as a stake driven into the "bed). No one can say that in this case "extent to which the appellant has "into the river is so small as to be, like "case of a stake driven into the soil, "appreciable." The extent of encroa ment was a slip tapering from 2½ feet to point. It appears to us that a projecti exceeding 15 feet in length and with a de of 5 feet is by no means an inappreci projection, and we have before determi that it is not necessary for us to declare there is immediate probability of injury the plaintiff's property. That the action the water at this place is considerably gre than has been represented by the Counsel the respondent in course of argument quite evident on a reference to the depos of Neelmonee Mitter, who says: "T "khal in some places made its way thro "the old wall and encroached upon "defendant's garden, and in those places "wall came down, and ruins are to be fou "in some places." The order that accordingly make is, that the judgment the Lower Appellate Court, so far as declares that there has been an encroachme is affirmed; but in so far as it dismisses th suit of the plaintiff, it is reversed; and, in lie of it, it is declared that the encroachme which the plaintiff has established is at the point B, on the map marked D, at which poi the wall has been carried to a distance 5 feet to the north of the original wall, and th that encroachment extends eastward from th point Q through a point 5 feet south of B and thence to the point of intersection of a line drawn from that point to a point 5 feet to the north of C, with the present wall-face, and it is declared that the plaintiff is entitled to have this portion of the wall removed, but, in consideration of the season of the year, we think the proper order will be to declare that the defendant is bound to remove this

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e the 31st day of December next, and fault of his having removed the encroach- to the satisfaction of the Court by that the plaintiff will be at liberty to take execution and have the encroachment erly removed. The plaintiff will get the incurred by him in the litigation.

The 5th July 1876.

Present:

Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

ract—Hoondees—Consideration—Value re-ved—Bond—Delivery—Condition Prece-nt—Minor.

Case No. 525 of 1875.

cial Appeal from a decision passed by the udge of Zillah Patna, dated the 23rd of ecember 1874, affirming the decree of the ubordinate Judge of that District, dated e 29th of June 1874.

hun Chowdhry and another (Defendants), *Appellants,*

versus

Madho Lall (Plaintiff), *Respondent.*

essrs. R. E. Twidale and *M. L. Sandel* for Appellants.

Mr. R. T. Allan and *Moonshee Mahomed Yusuf* for Respondent.

Where a plaintiff sued on his own behalf and that of inor brother, whose guardian he was, to recover the ount of certain hoondees which defendants had given for value received, pleading that, on the dishonour- of the hoondees by the agent of the defendants, the ter had executed a fresh bond for the amount of the ondees, which bond, however, they had failed to deliver plaintiffs; and defendants urged in the lower Courts, *rstly*, that, as one of the plaintiffs was of age, the suit his behalf by a brother claiming to be his guardian ould not lie; and, *secondly*, that they had never drawn y hoondees at all, and that the bond referred to in the aint had been drawn up against certain consideration, t had not been delivered, because the consideration had ever been received; and the first Court threw out the it on the ground that, after the execution of the bond, n action on the earlier hoondees would not lie, but found, on remand, that the hoondees had actually been drawn by defendants, and accepted by their agent, notwithstanding that he had been unable to honour them, HELD that, although, as found by the Lower Appellate Court which had ordered the remand, delivery of the bond was a condition precedent of its validity, and the defendants' failure to deliver it to plaintiffs had precluded plaintiffs from proceeding upon it, yet this circumstance, so far from necessitating the rejection of plaintiffs' suit, threw them back upon the original hoondees, the clear proof of the drawing of which entitled the plaintiffs to a decree.

[NOTE.—A double issue, involving a point of fact as well as a point of law, which was raised in this case, has not, it will be seen, been covered by this decision. It has not been found whether one of the plaintiffs was or was not a minor: or held that his majority, if he was not a minor, either precluded or did not preclude his brother from acting without special authority in his behalf.]

Kemp, J.—THE defendants are the special appellants in this case. Madho Lall, for himself and as guardian of his minor brother, sued three defendants, Sohun Chowdhry, Munno Lall Chowdhry, and Golab Chowdhry. The third defendant Golab Chowdhry has been absolved by the lower Courts, on the ground that he is a mere servant of the other defendants, Nos. 1 and 2. The plaintiffs say that they are goladars; that the defendants Nos. 1 and 2 had transactions with them; and that the suit was brought on three hoondees to recover the amount of Rs. 3,595-4, principal and interest, the plaintiffs averring that the defendants Nos. 1 and 2 had dealings with their *arut*, and, in lieu of value received, they gave three hoondees on their Calcutta agent, the defendant No. 3; that they endorsed the hoondees to plaintiffs' firm; that the plaintiffs sold them to three other firms; and that the latter firms, not obtaining payment from Golab Chowdhry, the Calcutta agent, returned the hoondees, and recovered the money from the plaintiffs. The plaintiffs, therefore, institute this suit on the basis of those three hoondees, after having given notice to the defendants that they had been dishonoured. There is also mention made in

the plaint that, when the defendants were pressed for the money, they expressed their inability to pay, and executed a bond, dated the 27th of June 1871, in the name of Mussamut Ruttun Bibee, the mother of the plaintiffs, Madho Lall then being a minor; and that the defendants, although the bond was duly registered, on some pretence or other, did not deliver it.

In answer to this statement of the plaintiffs, the defendants first state that, as one of the plaintiffs was a major, the suit on his behalf by the other plaintiff, as guardian, was inadmissible; that they never drew any hoondees at all, nor did they sell any to the plaintiffs; that the hoondees were never accepted by Golab Chowdhry, the Calcutta agent; that no demand was ever made on them; and that the claim of the plaintiffs was wholly false. Then, with reference to the bond of the 27th of June 1871, they state that, being pressed by certain necessities, they applied for money to the mother of the plaintiffs; that, on this, they executed a bond for 3,500 rupees; and that, after the execution of that bond, the lady not having paid the consideration, the bond was not delivered. Then follows a very important part of the written statement that the bond was not executed on account of any hoondee money due to the plaintiffs, nor was any money due on account of any hoondee.

The case went before Baboo Gobind Chunder Sandyal, the Subordinate Judge of Patna, and he was of opinion that it could be disposed of on one issue, namely, that "inasmuch as according to the plaintiffs a bond has been executed by the defendants regarding the amounts in suit, is the plaintiff entitled to sue on the basis of the original hoondees on which the said amount is alleged to be due?" He held for reasons given in his judgment that the plaintiffs had no cause of action, inasmuch as the hoondees had been entirely cancelled, and superseded by the bond; and that the plaintiffs had no right to sue on the hoondees, abandoning the bond. He therefore dismissed the plaintiffs' suit.

On appeal, the Officiating Judge of Patna, Mr. Towers, reversed the decision of the Subordinate Judge, and remanded the case, under section 351, for trial on the merits. He was of opinion that the delivery was an essential part of the contract, that the contract which the defendants set up, namely, the bond, had been carried out, the hoondees would have been returned to the defendants, and the bond made over to the plaintiffs; but neither was done, and that the delivery of the bond was clearly a condition precedent to the cancellation of the hoondees. He, therefore, was unable to see why the plaintiff should be compelled to carry out the part of the agreement with reference to the bond after the defendants had resiled from theirs.

On remand, the Subordinate Judge found that the hoondees had been proved; that the gomashtas of the three firms to which the hoondees had been endorsed were examined, and they proved these hoondees; that a number of traders had also been examined whose evidence proves that the defendants had purchased goods and paid the price from the plaintiffs' *arut;* and further, that the bond of the 27th of June 1871 appears to have been executed by the defendants Nos. 1 and 2 for the amount due on the hoondees. He, therefore, gave the plaintiffs a decree absolving the defendant, Golab Chowdhry, on the ground that he was merely a servant of the defendants Nos. 1 and 2.

The case was again appealed to the Judge of Patna, Mr. Craster, who affirmed the decision of the first Court, and dismissed the appeal. He was of opinion that the evidence given by the witnesses examined, and the fact of the hoondees having been accepted by the defendants' agent in Calcutta, upon whom they were drawn, prove that the

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hoondees were genuine, and that the defendants are liable for the amount for which they were drawn.

In special appeal the points taken are, *first*, that the fact of the bond being admitted, the plaintiffs' suit on the basis of the hoondees ought to have been dismissed; and, *second*, that the Court below, after remand, has not considered the question of the consideration for the granting of the three hoondees in dispute.

We are of opinion that the plaintiffs are entitled to sue upon the hoondees. The written statement of the defendants in this suit raised this question, denying the hoondees altogether; and, further, although they admitted the execution of the bond of the 27th of June 1871, they stated that *that* bond was not executed for any money due to the plaintiffs on account of any hoondees. The Judge has found in his first decision when remanding the case that the bond was never delivered; and that, if the contract had been carried out, the hoondees would have been returned to the defendants, and the bond made over to the plaintiffs, but that neither was done. We think with the Judge that the delivery of the bond was clearly a condition precedent to the cancellation of the hoondees; and that the plaintiff is entitled to sue on his original cause of action, namely, on the three hoondees.

Then, with reference to the second point, we find that one of the issues, after the remand by the Judge, was whether value had been received from the plaintiffs' firm for these hoondees by the defendants. The first Court found that the hoondees were proved, and that many witnesses have deposed that the defendants had purchased goods and paid the price from the plaintiffs' *arut*. There is also a finding that the bond of the 27th of June 1871, although not delivered, was executed for the amount due on the hoondees to the mother of the plaintiffs.

On the whole case, therefore, we think that the decision of the Judge is correct. The appeal is dismissed with costs.

The 6th July 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and W. Ainslie, *Judge*.

Privy Council Appeal—Certificate of Qualification for Appeal—Certificate under Act VI. of 1874 not a judgment of Court—Charter of 1865.

Case No. 9 of 1876.

Appeal under section 15 of the Letters Patent from decrees passed by the Hon'ble W. Markby and the Hon'ble A. G. Macpherson, two of the Judges of this Court, in Privy Council Appeals Nos. 9 and 37 of 1875, dated respectively the 7th April 1876 and 3rd December 1875.

Mussamut Amirrunnessa (one of the Defendants), *Appellant*,

versus

Baboo Behary Lall (Plaintiff), *Respondent*.

Baboo Durgadass Dutt for Appellant.

No one appeared for Respondent.

Case No. 37 of 1875.

Keshub Chunder Acharjee (one of the Defendants), *Appellant*,

versus

Hurro Soondury Debea (Plaintiff), *Respondent*.

Mr. A. M. Bose and *Baboo Kishendoyal Roy* for Appellant.

Baboo Nullit Chunder Sein for Respondent.

Where an appeal was made from an order of a Judge of the High Court, granting a certificate under Act VI. of 1874, to the effect that the subject-matter of a certain suit was of the value of Rs. 10,000, and thus allowing an appeal to the Privy Council, HELD by a Bench of the Court that, as Act VI. of 1874 did not confer the right of such an appeal, it could only be allowed now if it could be shown that the right existed before the passing of

that Act; and FOUND that, as a matter of fact, such a right did not previously exist.

Although, under s. 15 of the Charter of 1865, an appeal is given to the High Court from any judgment of a single Judge, an order or certificate of a Judge allowing an appeal to the Privy Council cannot properly be considered a judgment of the High Court. Such an order has its origin in an Act of Parliament for the better administration of justice in the Privy Council, and belongs rather to Privy Council proceedings than to the legitimate province of the High Court.

In this view it is immaterial whether an order and certificate are for admission or refusal of an appeal to the Privy Council.

The question was raised in this case, but not decided, whether it was *ultra vires* of the Indian Legislature to destroy any right created by the Charter of 1865.

No. 37 of 1875.—THIS is an appeal from an order of Mr. Justice Macpherson, made in the Privy Council Department, under Act VI. of 1874, granting a certificate that the subject-matter of the suit was of the value of Rs. 10,000, thus allowing an appeal to the Privy Council.

An objection has been raised that no appeal lies from such an order, and we are referred to a case reported in the March Number of the Indian Law Reports, p. 103, in which it was decided by Mr. Justice Macpherson and Mr. Justice Jackson that no appeal lies from a certificate granted under such circumstances.

Their Lordships considered that from the language of sections 11 and 12 of Act VI. of 1874, and more especially from section 11, which provides for the proceedings in appeal being commenced at once upon the certificate being granted that no appeal against the certificate was contemplated by the Act.

In the present case it has been urged very strongly by Mr. Bose, the Counsel for the appellant, that, by the 15th section of the Charter of 1865, an appeal is directly given to the High Court from any judgment of a single Judge, and that the order, which has been made by Mr. Justice Macpherson, is a judgment within the meaning of that section.

It is then further argued that, although no appeal may have been given or contempl by Act VI. of 1874, that would not have effect of taking away a right of appeal w was given by section 15 of the Charter, that, even if the Act had professed to away the right by express words, the e ment would have been *ultra vires* and in ative.

It is obvious that the first step in Mr. B argument was to establish that before the of 1874 an appeal did lie from such an as the present, because, if it did not, we it perfectly clear that the Act of 1874 not confer such a right. In that respect entirely agree with Mr. Justice Macph and Mr. Justice Jackson, and indeed unde circumstances we should consider our bound by their judgment, unless we satisfied that Mr. Bose's argument was founded, in which case we should thi right to submit the point for the consider of a Full Bench.

The first question then which we hav determine is whether an appeal did lie b the Act of 1874, against an order or ficate of a single Judge admitting an a to the Privy Council.

For the purpose of answering this que it is necessary to ascertain how the allow or disallowance of an appeal to the Pr Council became, in the first instance, a mat for the High Court to decide.

By the 39th section of the Charter of 1 as well as of that of 1862, an appeal is gi to the Privy Council from any final judgm decree, or order of the High Court, provi that the value of the claim amounted Rs. 10,000, or that the case was one which apart from the question of value, the Hi Court should consider to be a fit one f appeal; and then follow these words: "Sub- "ject always to such rules and orders as are "now in force or may from time to time be "made respecting appeals to the Privy Council "from the Courts of the said Presidency."

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he time of the passing of these Charters, rules were in force which had been by the Queen in Council under the Act 4 Will. IV., Cap. 41, for regulating gst other things) the admission of ls from the Supreme Court of this Presi- to the Privy Council, and by the d of those rules it is ordered "that, in ases in which any of the Supreme Courts dia should admit an appeal to the Privy ncil, the Court should specially certify he proceedings that the value of the er in dispute in such appeal amounts he sum of Rs. 10,000 or upwards, h certificate should be deemed conclu- of the fact, and not liable to be ques- ed in the appeal to the Privy Council."

is under this rule that, previously to VI. of 1874, the High Court exercised ower of admitting or refusing appeals Privy Council so far as regards the ion of value.

would seem that for a short time (proba- wo or three years since the passing of the ter) the power was exercised by a Court posed of two Judges, but, during by far larger portion of this period, the duty been delegated to a single Judge called "Judge of the Privy Council Appeal artment."

e have been unable to find a single in- ce, previously to the 23rd of August 1873, ny attempt to appeal against an order or ificate made by a Judge of this depart- t, and indeed it is very difficult to under- d how an order or certificate under Rule the Privy Council orders could properly considered as a judgment of the High Court. was in aid of the Privy Council that the e was established; it has its origin in an t of Parliament passed expressly "For better administration of justice in H. M.'s vy Council," and the certificate given der it would seem rather to form a part of the Privy Council proceedings than to come within the legitimate province of this Court.

Again, the fact of no attempt having been made for many years after the passing of the Charter to appeal against these certificates, affords a strong argument that, according to the interpretation which the Charters received at the time when they were passed, and for several years afterwards, such certificates were not considered to be the subject of appeal—"*optimus legis interpres consuetudo.*"

But we are then referred by Mr. Bose to several cases, most of which are not reported, in which appeals from a single Judge in the Privy Council Department have been entertained and decided by a Division Bench of this Court.

The first of these was an unreported case of Thakoor Jeebnath Singh *vs.* Ram Narain Sing, decided, on the 23rd of August 1873, by Chief Justice Couch and Mr. Justice Jackson. It was an appeal from an order of Mr. Justice Markby, admitting an appeal to the Privy Council; and after hearing Counsel upon the merits, the Court dismissed the appeal. In that case it seems to have been doubted by the Court whether there was any right of appeal in such a case, and they seemed to think that there was, because it had been held by a Full Bench that an appeal lay from the judgment of the senior Judge of a Division Bench in special appeal. The attention of the Court does not seem to have been drawn to the very obvious distinction between a judgment on special appeal which was no less a judgment, because it was decided by a single Judge, and a mere certificate admitting an appeal to the Privy Council. Moreover, we find that the Chief Justice in that case especially mentioned that the point was not argued, and that, therefore, the case must not be considered as a ruling in favour of a right of appeal.

This decision appears to have been followed by several others in the years 1874 and 1875

(two of which are reported), in each of which the order of the Judges in the Privy Council Department was confirmed. The point whether there was any right of appeal was not directly raised or decided in any of those cases, nor was it in fact necessary to decide it, because the orders were all confirmed upon the merits; but it is worthy of remark that in four out of these cases some doubt as to the right of appeal was expressed by the Courts.

We consider, therefore, that we are now called upon to decide the question for the first time, and having regard to what we have already said as to the nature of the proceedings, and to the fact that, for many years after the passing of the Charters, no appeal against these orders appears to have been attempted, we are of opinion that the order in question was not a judgment, and that no appeal would have been against it before the Act of 1874.

The foundation, therefore, of Mr. Bose's argument having failed, it is unnecessary for us to decide the further and more important question which he has raised, *viz.*, whether, if a right of appeal had existed under section 15 of the Charter, the Legislature of this country had any power to take away that right.

The result is that, having no power to entertain the appeal, we dismiss it with costs.

Another case, No. 9 of 1876, was postponed to abide the result of this, in which the only distinction was, that the appeal was against the *refusal*, instead of the *admission*, of the appeal.

We consider that, having regard to the grounds of our judgment, this distinction is immaterial.

That appeal, therefore, is also dismissed with costs.

The 6th July 1876.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Relief from Obligation—Sleeping Partner's Liability—Undisclosed Interest.

Case No. 153 of 1875.

Regular Appeal from a decision passed by the First Subordinate Judge of Zila Backergunge, dated the 26th April 1875.

Nidra Dassee, widow of Shumbhoo Nath Shaha (Defendant), *Appellant,*

versus

Abdool Wahed and others (Plaintiffs), *Respondents.*

Baboos Kally Mohun Dass, Mohinee Mohun Roy, and *Doorga Mohun Dass* for Appellant.

Mr. Evans, Baboos Rash Behary Ghose and *Bhoobun Mohun Dass* for Respondents.

If a person allows property to be purchased for him in the name of another, and takes no steps to show to the world that he is the owner, he must make out a clear right to relief against any one who purchases the property *bonâ fide* from the ostensible owner.

Where the widow of one of two brothers, who were partners in business, sought to recover property which had been sold in execution on foreclosure of a mortgage effected by her husband's brother, and it was found by the lower Court that the brother appeared to the world as the manager of the property, that the mortgage had been created in good faith, and that the money received as consideration had been employed in meeting liabilities in which plaintiff had a share, HELD, notwithstanding plaintiff's plea of ignorance of the mortgage, and her contention that the loan, if contracted, had been improperly contracted, that plaintiff was not entitled to the relief which she sought.

Where a plaintiff fails to prove his case in his own way, it does not follow that he may not make out a good right on the facts established by the defence.

A creditor taking a mortgage from an accredited agent cannot be expected to prove that no other person has an undisclosed interest in the hypothecated property.

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THE plaintiffs have brought this suit against Muddun Mohun Shaha and Ram Churn Shaha to obtain possession with mesne-profits under two foreclosed mortgages of certain properties scheduled in the plaint. The mortgages were both created on the same day, 2nd August 1870, one for a sum of Rs. 7,010 by Baluk Chand Shaha, and the other for Rs. 17,990 by his sons, the defendants. The reason for this was that the properties mortgaged had been acquired in the names of the parties by whom the deeds were executed, but it is stated that both were really created by Baluk Chand. Notice of foreclosure was given on 24th November 1872, and the conditional sales became absolute on 24th November 1873; and, though a further period of 20 days was granted to the mortgagors for redeeming the property, they did not avail themselves thereof. The defendants admitted the mortgages and foreclosure, and merely contended that they had surrendered the property, and were not liable for mesne-profits, and ought to recover their costs.

One Nidra Dassee, widow of Shumbhoo Nath Shaha, came in and was made a defendant in the suit, and it is with her appeal that we have to deal. She alleged that the mortgages were fraudulent; that she had no knowledge of the receipt of the money for which they purported to be granted; that no debt was ever incurred for the benefit of the business or estate; that her husband and Baluk were brothers living in commensality, and carrying on business together, out of the profits of which they purchased a portion of the properties in suit which they held in equal shares. On the death of Shumbhoo, the defendant remained in commensality with Baluk and his sons, and carried on business jointly. Out of the profits of the above-mentioned properties, and with the funds of the joint trading and money-lending business, the other defendants acquired the remaining properties in suit, and they held them in the same way. The defendant thus claims one-half of all the property in suit, and alleges that Baluk and his sons created the mortgages in collusion with the plaintiffs in order to destroy her rights.

The Subordinate Judge has found that the mortgages were *bond-fide* transactions, and not fraudulent and colourable as alleged by defendant; that Baluk and Shumbhoo carried on business jointly, and that this business has been continued by their representatives (the three defendants), and is still jointly carried on by them; that Baluk managed this business so long as he lived; that the property was acquired by both brothers out of the profits of their business, and that there existed no other funds from which the purchase-money could have been drawn. He then held that, under the Hindoo Law current in Bengal, Baluk was authorized to effect the mortgages, inasmuch as they were created to discharge debts binding on the whole family, and that in fact the sum of Rs. 11,000 was at once applied in part-satisfaction of a decree against Baluk, his sons, and Nidra.

In appeal it has been argued that there is no evidence of any necessity such as under Hindoo Law authorizes the "kurta" of a joint Hindoo family to deal with the family-property, and that at the most the only debt on the estate for which Nidra could be made liable was the one for which a decree had been made against her under which Rs. 11,000 had been paid to Manick Moye.

Cases from that of Hunnoman Pershad Pandi downwards were cited to show the limitations of the power of a single member of a Hindoo family to aliene the family-property; but there is nothing in the reports

6 Moore's I. A.	...	393
3 W. R.	...	119
6 ,,	...	193
9 ,,	...	452 & 483
17 ,,	...	139
20 ,,	...	192
8 B. L. R. Appls.	...	5
1 Bombay Rep.	...	39

to show that in any one of these cases the circumstances were similar to the facts of the present case in which the mortgaged property is properly acquired and held in the names of the mortgagors themselves excepting a small portion which was taken in the name of Brij Mohun Sahoo, who was made to sign the mortgage-deeds as a witness.

We think the Subordinate Judge was quite right in his findings of fact; the plaintiff no doubt gave evidence to show that Nidra had no interest in the business carried on at Nihalgunge, but the defendant avers the contrary, and the evidence supports her assertion. It would have suited the plaintiff's purpose if the Court had come to an opposite conclusion, and had adopted his statement on this point, or rather that of his witnesses, for, owing to the mode in which the defendant has come into the suit, the original written statement of the plaintiff does not allude to her; but it does not follow that, because he fails to prove the case in his own way, he may not make out a good right to a decree on the facts established by the evidence for the defendant. This seems to be one of those cases in which a party, misapprehending the strength of his position, seeks to mend matters by taking up stronger ground which he cannot maintain—the result is not that he must absolutely fail. If it was necessary for the defendant to rebut the evidence given by plaintiff, and if, as a consequence, the Court found the facts stated by her to be to a certain extent true, the plaintiff is entitled to use those facts, if he can do so.

In this case we think he can do so effectually. The facts then are as follow: After Shumbhoo's death, Baluk was the person who appeared to the world as the manager of the business; and, although Nidra had an interest in it, she had no other agent in the matter than Baluk. The properties mortgaged had been purchased by Baluk principally in his own name and in that his sons, but also partly in that of B Mohun. It has been proved by the app lant's own witness, Prosonno Coomar Bisw that in respect of none of the properties suit was Nidra's name disclosed as co-p prietor either to the superior proprietor, in the mofussil, or (up to the date of foreclosure-proceedings) in any Court office.

Under these circumstances, a cre taking a mortgage from Baluk could ha be expected to prove that no other per had an undisclosed interest in the prope It was for the defendant to prove this, and show, not only that she has a title to a sh of the property, but that she is in no w bound to pay the debts for which the mo gage was effected. If a person allows pr perty to be purchased for him in the name another, and takes no steps to show to t world that he is the owner, he must ma out a clear right to relief against any o who purchases *bonâ fide* from the ostensi owner.

The money raised by the mortgage w applied partly (Rs. 11,000) to pay the claim of Manick Moye, for which decree had been made against the appell herself jointly with Baluk and his sons, a partly (Rs. 14,000) to balance a debt Mohamed Kadir. There is evidence th the latter was incurred in carrying on t business in which Nidra was a sleepi partner, and, under the circumstances, think the appellant has made out no right resist the plaintiff's obtaining possession virtue of the foreclosed mortgage.

The appeal is dismissed with costs.

The 6th July 1876.

Present:

Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

ts of Purchaser—Equity of Redemption—Limitation—Usufruct.

Case No. 58 of 1875.

ial Appeal from a decision passed by the ficiating Judge of Patna, dated the 2nd eptember 1874, affirming a decree of the dder Moonsiff of that District, dated the th January 1874.

amut Fuzeelut-un-Nissa, daughter of ssamut Ameer-un-Nissa (Plaintiff), *Appellant,*

versus

reenath Rai and Syud Fuzul Hossein (Defendants), *Respondents.*

onshee Mahomed Yusuf for Appellant.

Mr. M. L. Sandyal for Respondents.

here the purchaser of certain property, which had mortgaged to some one else, brought a suit to re- it and recover possession, pleading that the lien mortgagee had been satisfied by the usufruct; but riginal owner intervened, and, obtaining a stand- the suit in the first Court, got the suit thrown out an issue in limitation, because plaintiff had not taken ession within three years of the purchase, HELD the lower Court had acted wrongly in giving the inal owner a standing in the suit, seeing that, in ue of the *bonâ-fide* sale of the property by the owner laintiff, the plaintiff now stood in the owner's shoes; that as, under these circumstances, plaintiff's claim not barred by limitation, plaintiff would beentitled a decree if he could get one on the merits.

As the lower Court had dismissed the suit on the a of limitation, a remand-order was made for a trial the merits.

THE plaintiff is the special appellant in is case. She sued to recover possession n respect of 8 dams 18 cowries 6 boories f land, and of the entire 16 annas of Mouzah Karowtha, Pergunnah Musoda, and also to redeem a mortgage and cancel a deed of sur-i-peshgee lease, dated the 10th of August 1874, to cancel three bonds set out in the plaint, and also to recover the sum of 206 rupees and a fraction, being the surplus amount of wasilat due from the defendant to the plaintiff. The plaintiff sets forth her title in this way, that she purchased by a deed of absolute sale the share in question from Fuzul Hossein on the 29th of January 1860, and obtained a decree in his presence for possession of the said share on the 24th of February 1860. Then she alleges that the principal and interest due to the mortgagee having been satisfied from the usufruct of the property, the sum of 206 rupees odd is due to her from the defendant. She further states that her cause of action accrued in 1274 F.S., the year in which, after satisfaction of the total amount due to the defendant, the surplus amount fell due.

In the first instance the mortgagee was the only defendant in the case. Subsequently Fuzul Hossein applied on the 2nd of May of 1873 to be made a party to the suit, and the Moonsiff on the 3rd of July of the same year directed him to be made a party.

The Moonsiff in the proceeding laying down issues raised several issues on limitation, and also whether the decree of the 24th of February 1860 was barred by three years' limitation, the plaintiff not having taken out execution within three years; and whether the defendant, mortgagee, had any right to question the decree of the 24th of February 1860. The Moonsiff found that limitation of sixty years was not applicable to this case; that the mortgagee and the original owner were both against the plaintiff, and have been proved to have held adverse possession for a period of twelve years. In the body of his judgment, the Moonsiff makes certain remarks upon the decree obtained by the plaintiff in February 1860. He says that he is unable to make out why possession was not asked for under the decree, and why a false statement was

made that possession had been given under it except that the contract was not *bonâ fide*, and was made to serve a certain purpose, and was not intended to affect the owner but some other person in future. He therefore dismissed the plaintiff's suit.

On appeal the Officiating Judge in a very few words affirmed the decision of the Moonsiff. He says he agrees with the Moonsiff that the suit is barred by the law of limitation; and in respect of the decree, dated the 24th of February 1860, he observes that it was never executed by delivery of possession, and cannot now be executed; and that the plaintiff is barred from bringing a second suit on the same cause of action, and that there are very suspicious circumstances in the case.

In special appeal the grounds taken are, that the suit of the plaintiff is not barred by the statute of limitation, and that the Moonsiff had no jurisdiction to enter into the question as to whether the decree of the 24th of February 1860 was *bonâ fide*, the question not arising between the plaintiff and Fuzul Hossein, who was a party to that decree, and who is bound by it.

On referring to the decree of the 24th of February 1860, we find that the plaintiff's mother, as her guardian, sued for possession and substitution of her name, basing her claim upon a kobala executed by Fuzul Hossein on the 29th of January 1860. The suit was instituted immediately after the execution of the kobala; and the decree, which was not an *ex-parte* one, but was passed in the presence of the vendor, Fuzul Hossein, was dated the 24th of February 1860. We are therefore clearly of opinion that the Moonsiff ought not to have made Fuzul Hossein a party to this suit, and this objection is taken in the sixth ground of special appeal. We are also of opinion that limitation does not bar the plaintiff's suit. She having purchased the rights and interest of Fuzul Hossein she stands in his shoes, and as mortgagor she is entitled to redeem the property, and is not barred in any way by the twelve years' limitation. We therefore think that the case must go back to the Moonsiff for a finding on the merits as between the plaintiff and the mortgagee.

The plaintiff will get her costs from Fuzul Hossein, he having improperly thrust himself into this litigation. As between the plaintiff and the mortgagee, the costs will follow the result.

The 7th July 1876.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Under-tenures—Sale Law—Special Registration—Partition.

Case No. 2261 of 1875.

Special Appeals from a decision passed by the Judge of Zillah Dacca, dated the 3rd May 1875, modifying the decree of the Subordinate Judge of that District, dated the 2nd August 1874.

Trilochun Chuckerbutty (one of the Defendants), *Appellant,*

versus

Komola Kant Chuckerbutty and others (Plaintiffs) and others (Defendants), *Respondents.*

Case No. 2516 of 1875.

Komola Kant Chuckerbutty and others (Plaintiffs), *Appellants,*

versus

Nurro Singho Singh and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Hurry Mohun Chuckerbutty* for Appellant.

Baboos Nullit Chunder Sein and *Rash Behary Ghose* for Plaintiffs, Respondents.

Baboos Grija Sunker Mozoomdar and *Kashee Kant Sein* for Defendants, Respondents.

ough, on the sale of a zemindaree for arrears of ue, the Government has the right to annul all r-tenures not specially protected, yet it cannot be n for granted that the Government has enforced its me rights; and, even where the right of the Govern- t to do so is asserted in the course of the proceedings, a matter which has to be decided upon evidence her, having asserted its right, the Government rwards actually enforced it.

here a Collector had made a butwara, and the tion further arose whether the Government had ded at redemption to destroy the under-tenures, D that a finding to the effect that the under-tenures not been destroyed did not, in any way, affect the wara.

We think there is no ground for inter- ence in this case. The question before Judge was, what was the intention Government in dealing with certain perty purchased in 1835 at a sale for ars of revenue. In 1836, proceedings e taken by the Collector to resume and ess the under-tenures, including the parti- ar under-tenure which forms the subject this suit. There were two settlements de of this afterwards—one in 1842 for period of 20 years, and another in 1862 a period of one year before the sale the zemindaree right by Government. e way in which this case has been put fore us is this: It is contended that the ly legal inference to be drawn from the ceedings of the Collector in 1836 is t the Government annulled all the viously-existing tenures, and that the tlement of the tenure now in dispute h the previous holders thereof was in t the creation of a new tenure, subject new conditions. We do not think this a necessary inference, and we see that, the case of Khajah Asanoollah, reported page 317 of 13 Moore's Indian Appeal ses, the Privy Council, in dealing with subordinate talook forming part of this y property, came to the conclusion that ere was strong evidence to show that was the intention of Government, what- "ever might be their extreme rights, to "make settlements with the talookdars of "all classes, putting them, or at least all "who were not specially protected against "enhancement of rent, in the position which "they would have held of right before 1822, "*viz.*, that of under-tenants entitled to retain "possession of their lands during the sub- "sistence of their tenure, subject to the "condition of having their rents enhanced." The proceedings in both cases seem to have been of the same nature, and there is nothing in the roobocarry of 12th March 1836 which the Judge was bound to accept as conclusive. No doubt, that roobocarry did declare the right of Govern- ment to cancel the tenure which had been created by the defaulting zemindar, but whether the Government, having asserted its right, afterwards enforced it, is a matter which has to be decided upon other evi- dence; and even if the proceedings of the Revenue Board, which were discussed and commented upon and acted upon by the Privy Council in the case quoted above, were not put in evidence in this case, we think the Judge was bound to take notice of them in conjunction with other matters bearing upon the question, and to come to his own conclusion. No doubt, in another case reported in 23 W. R., p. 245, this Court, in regular appeal, arrived at a conclusion differing from what was adopt- ed by the Privy Council in the case of Khajah Asanoollah, and has been adopted by the Judge in the present case. It is not our intention to express any opinion in regard to that case. It is sufficient to say that that case came up before this Court in regular appeal, and the Judges had to deal with the facts of that particular case. The only question now before us in special appeal is, whether the Judge was at liberty to come to the conclusion at which he has arrived, and we think that there is nothing

in the terms of the first proceedings to prevent him from doing so.

As to the question of limitation, we think that the fact, that a person has a lease for a term of years, and obtains quiet possession, is *primâ-facie* evidence to show that he continued in possession to the end of his term, until the same is shown to have been disturbed.

Then, as to the distribution made by the Judge in his decree, we think that we cannot at this stage interfere. The parties have so dealt with the property by private partition that that distribution is really the only one which can be made to do justice between them, and is in fact what must be the result of further suits if the order of the first Court is to stand. We have no power to set aside the butwara which has been made by the Collector, and, seeing that the plaintiffs chose to stand by for 9 years after the butwara had been effected, and had not brought this suit till the period prescribed by the Law of Limitation was at the point of expiry, we do not think they ought to complain. Nor can we entertain the objection of Trilochun, the appellant in No. 2261. It was by his own act, at any rate with his own consent, that the property was broken up; and, if the estate had remained undivided, the result would have been precisely what it is now. There would be a 16-annas talook with a 16-annas dur-talook. The difference is simply this: That now there are three talooks of 1 anna, 7 annas, and 8 annas, making up 16 annas of the talook; and three dur-talooks of 1 anna, 7 annas, and 8 annas, making up 16 annas of the dur-talook. Appeal No. 2261 is dismissed with costs. Appeal No. 2516 by the plaintiffs is also dismissed, but we make no order as to costs.

The 10th July 1876.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Adjudication of Right—Confirmation of Possession—Collusion—Partition.

Case No. 148 of 1875.

Regular Appeal from a decision passed by the Subordinate Judge of Zillah Tirhoot, dated the 27th February 1875.

Behary Lall and others (Plaintiffs), *Appellants,*

versus

Jugdeo Pershad, 1st party, who appeared, and Cheetun Lall, 2nd party, who did not appear, in this appeal (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

Where an estate had been sold in satisfaction of a decree, and the sons of the judgment-debtor sought to be confirmed in their possession of the estate on the ground that it was ancestral property, and that they had obtained a partition-order against their father previous to the date of the auction-sale, but the defendant contended that the partition-order had been obtained in collusion with the father in order to frustrate the decree which had previously been obtained by the judgment-creditor, HELD that, looking to the fact that execution had not been taken out of the partition-decree, and that no attempt had been made to divide the property by metes and bounds, and that special notifications had been issued to the tenants to consider the sons as sole proprietors, and to pay all the rents to them, the partition must be taken to have been collusive.

THE plaintiffs are the appellants in this case. They are the two sons of Chuttur Lall, and they sue Jugdeo Pershad, the auction-purchaser in satisfaction of a decree, and join their father as a co-defendant. The father did not defend the suit. The claim was for adjudication of right and

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firmation of possession in respect of annas 3 gundas 1 cowrie and 1 krant Mouzah Dhanna Garowl *uslee*, and 3 gun- 1 cowrie 1 krant of Putte Bellur *bilee*, in Chukla Gurjowl, Pergunnah ara, in the District of Tirhoot, which, plaintiffs allege, are their ancestral pro- rty. They set out in their plaint that obtained a decree, dated the 4th of bruary 1874, as against their father uttur Lall, for partition of these mouzahs; t, at the time of the auction-sale at ich the defendant purchased the property, y objected to the sale thereof; and that ir objection was overruled on the 16th May 1874 under section 246 of the il Procedure Code. They further say t, owing to extravagant expenses of their her, and the probability of the waste the entire property, the means of liveli- ood of the family were at stake, they erefore sued for partition, and obtained a ecree as already stated.

In his written statement, the defendant gdeo Pershad states that the plaintiffs er separated from their father, and are ill living in commensality and joint estate; t the decree obtained by the plaintiffs the 4th February 1874 for partition was btained subsequent to the decree under hich the defendant purchased; that the rmer decree was obtained by collusion ith their father, and was in fact held by e Court to be a collusive transaction; at the plaintiffs never executed that decree, nd never obtained separate possession under it; that the possession of the plaintiffs' father has always remained intact as before; that the suit brought by Chuttur Lall, the father, against Chuttur Dharee Lall and others, was brought in the name of the father by the plaintiffs, and was instituted for their benefit; and that it was in execution of the decree for costs in that suit awarded against the father that the defendant purchased the property now in dispute.

The Subordinate Judge, Baboo Grish Chunder Ghose, held, first, that the plaintiffs are not entitled to any relief whatever, inasmuch as they ask for confirmation of possession of the share of Dhanna Garowl, and have failed to show that they are still in possession of the said share; that, in the absence of such proof, they cannot claim to be heard on the merits; that, if their possession had been disturbed, they ought to have amended the plaint, or withdrawn from the case under section 97 of the Procedure Code; and that they are not now admittedly in possession. Hence they have no status. But, with a view to prevent multiplication of law-suits, the Subordinate Judge went into the merits of the case, and found that the decree which the plaintiffs obtained for partition was a collusive one, and could not operate to the prejudice of third parties, because it was fraudulently obtained to defeat their just dues. He therefore dismissed the plaintiffs' claim.

In regular appeal the main grounds are that the Subordinate Judge is wrong in holding that the plaintiffs ought to have shown that they were in possession of the disputed land at the time of his passing the decree appealed against, inasmuch as it was admitted by the defendant, and, in consequence of such admission, no issue was framed with reference to the question of possession; that the Subordinate Judge ought not to have held that the decree obtained by the sons for partition was a collusive decree; and also that he is wrong in holding that the plaintiffs are still joint with their father, and that their alleged separation was a myth, to use the expression of the Subordinate Judge.

The appellants have not thought it proper to have any evidence printed, either oral

or documentary, in support of their case. With reference to the first point, we think that the Subordinate Judge was wrong in saying that the plaintiffs had no status, because they sued for confirmation of possession, and failed to show that they were in possession at the time the decision of the Court was passed. It appears that, after the institution of the suit, the defendant applied to execute his decree, and that he obtained possession in execution thereof. But there is no contention on the part of the defendant that the plaintiffs were not in possession at the time the suit was brought, and consequently no issue was framed upon this question. As far as the merits of the case are concerned, namely, whether the decree obtained by the plaintiffs in 1874 was fraudulently obtained to defeat the just dues of the judgment-creditors, we think that the Subordinate Judge has arrived at a correct decision in this matter. The suit was brought for partition of the two mouzahs mentioned in the plaint; partition was not asked for in respect of other mouzahs, because they were encumbered with mortgages and debts. We find that, although a decree was obtained for partition, the Subordinate Judge, who is the same Judge who passed that decree, remarked that, in his opinion, it was a collusive suit; and, looking to the fact that no other steps were taken to execute that decree, we are of opinion that the suit was clearly a collusive one between the father and the sons. It appears that notification was issued to the ryots to consider the decree-holders as the sole proprietors of the share for which they sued for partition, and that they were to make payment of rent to them without objection. There is also a Nazir's report with a certificate of the peon that he gave symbolical possession to the decree-holders. It is very clear that the sons did not really execute that decree, nor did they take steps to have the property divided metes and bounds. On the whole therefore, fully agreeing with the Subordinate Judge that the suit of 1874 was collusive one, we dismiss the appeal costs payable by the appellants.

The 11th July 1876.

Present:

The Hon'ble F. B. Kemp and E. G. B

Judges.

Limitation—Wasilat.

Case No. 162 of 1875.

Regular Appeal from a decision passed the Subordinate Judge of Sarun, dated 10th March 1875.

Rajah Saheb Perhlad Sein Bahadoor (Plaintiff), *Appellant,*

versus

Gunness Lall Tewary (one of the Defendants) *Respondent.*

Mr. H. E. Mendies for Appellant.

Baboo Kally Prosunno Dutt for Respondent.

A period during which a party to a suit is engaged in prosecuting a claim for wasilat counts towards limitation if the Court in which the claim is prosecuted has jurisdiction to adjudicate it.

THE only question we have to decide in this appeal is whether the claim for wasilat is barred by the Statute of Limitation. The suit was instituted on the 22nd of September 1874. Therefore the suit is governed by the new Law of Limitation (Act IX. of 1871).

The pleader who appears for the plaintiff (appellant) admitted that, unless the Court allowed him to deduct the periods from the 4th of June 1870 up to the 10th of February 1873, during which period his client was engaged in prosecuting a claim for wasilat before the lower Court as well as in the High Court, his claim is barred.

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Subordinate Judge held that, even ing that section 15 of Act IX. of 1871 s to the application made by the plaint- mesne-profits, the plaintiff is not d to deduct the period mentioned . On referring to the Full Bench g of this Court, dated the 31st of h 1868, reported in 9 W. R., page 402, exclusion of such time from the period itation is made dependent on the con- that the former suit was dismissed defect of jurisdiction or other cause of nature, the Subordinate Judge held in this case the application of the iff for wasilat was not rejected from of jurisdiction in the sense in which rm is used in section 15. He, there- dismissed the plaintiff's suit as barred by tute of Limitation.

referring to the decision of the High t dated the 10th of February 1873, in llaneous Regular Appeal No. 230 of we find that Mr. Justice Phear and Justice Ainslie, on referring to the al decree, remarked that it appeared he decree, so far as regards mesne-pro- merely recited the particular claim for 202-8, and made no mention of any other with respect to mesne-profits; and that ecretal order was, "that the decree be d in favour of the plaintiff, awarding the with usual costs and interests." They, ore, held that the only claim for mesne- s which the decree could be made to was the claim for that particular item s. 5,202 and odd annas which was d by way of inducement to the order, hat unquestionably the decree did not ms reserve any question with regard to esne-profits for adjustment in execution decree. On these grounds, and on grounds alone, the application for exe- was rejected. Now, on referring to Full Bench decision in 9 Weekly rter, we observe that the majority of the Court held that the order of the Principal Sudder Ameen in that case had not been reversed on the ground of defect of jurisdiction or other cause mentioned in section 14. And here we may remark that that case was governed by the old Law of Limitation. Therefore the time during which the decree-holder was engaged in endeavouring to obtain the mesne-profits in the former execution-proceedings could not be deducted. The question we have to decide in this case is, whether the order of the lower Court which was reversed by Mr. Justice Phear and Mr. Justice Ainslie was an order passed without jurisdiction.

As observed by the majority of the Judges in the Full Bench Ruling already referred to, "it is one thing to say that the Court has not the power to make, or cannot properly make, a particular order in a suit, and quite another thing to say that the Court has not jurisdiction to entertain the suit or the particular application which it ought not to grant." In this case the lower Court, in disposing of the question which was properly before it, and which it had jurisdiction to entertain, namely, whether the decree-holder was entitled to the wasilat he claimed, gave him more than the decree entitled him to claim. And in so far as the lower Court had given the decree-holder more than the original decree entitled him to, his order was reversed. It was not reversed because the lower Court had no jurisdiction, for, beyond all doubt, the lower Court had jurisdiction; but because the lower Court was deemed to be wrong in giving mesne-profits which were not provided for in the decree. We are, therefore, of opinion that the Subordinate Judge was right in holding that the claim was barred by the Statute of Limitation.

The appeal is dismissed with costs.

The 11th July 1876.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Endowment—Mutawalli—Towleyutnama—Owlad—Alienation—Wuqf—Mahomedan Law.

Case No. 31 of 1875.

Regular Appeal from a decision passed by the Subordinate Judge of Zillah Hooghly, dated the 16th of September 1874.

Sheik Abdool Khalek (one of the Defendants), *Appellant,*

versus

Poran Bibee, wife of Kazee Abdool Huq, deceased (Plaintiff), *Respondent.*

Moonshee Seeraiul Islam and *Baboo Sharoda Churn Mitter* for Appellant.

Moulvie Murhamut Hossein for Respondent.

Where a plaintiff sued to recover certain lands which had been appropriated to religious and charitable purposes by the father of her deceased husband, and urged that she had been ousted by defendant, who was the son of a half-brother of her husband; but the defendant contended that he had been put in possession as manager by plaintiff herself and other widows of the plaintiff's deceased father-in-law, all which widows had some interest in the land under various deeds by which additions had been made to the original endowment; and defendant further pleaded that, under the original deed of appointment, plaintiff's husband could not alienate the property, and that plaintiff's possession would be a virtual alienation; and also that plaintiff's claim was barred by limitation, and that she could not hold the land without the sanction of the Government under Act XX. of 1863, HELD that, although plaintiff's original appointment by her late husband during his lifetime was unauthorized, yet, as alienation in such a case would mean alienation of the subject of the endowment rather than its transfer to plaintiff whose possession was not an adverse possession, plaintiff's possession did not defeat the purposes of the original appropriator, and could not be regarded as an alienation; and that, in these circumstances, even though the property were wuqf, there could be no defect in plaintiff's title.

An appropriator of land to special purposes can, under Mahomedan Law, confer the office of superin-ent on another at any time.

It was found in this case that defendant as a des-ant of the original appropriator had succeed-other properties which were quite distinct from th-in suit.

THIS is a suit *in formâ pauperis* to-cover 812 beeghas 7½ cottahs said to-been appropriated to religious and chari-uses, and which the plaintiff is entitle-hold as *mutawalli* or superintendent.

The plaintiff's case is as follows: 1238, Golam Shah and his wife Do-Bebee executed a *towleyutnama*, or dee-appointment, by which they appropr-428 beeghas 5½ cottahs for the expenses-repairs of mosques, wages of the mu-expenses of the two Eeds and lighting-taking care of fuqueers and travellers-others, and appointed their son Abdool-*mutawalli.* The deed further declares-after providing for the above-mentioned-jects, the surplus proceeds of the land-balance of the profits that may be le-hand, is to go to the use of the said *mu*-and his descendants (*owlad*) as may be-sary," and it declares that the *mutawalli*-his descendants shall have no power-alienation.

In 1261, Abdool Huq, being some-advanced in life and still childless, exec-another *towleyutnama*, appointing his-(the plaintiff) *mutawalli* of the said 428-ghas 5½ cottahs, to which he added 90-ghas 19 cottahs 5 chittacks of self-acq-property, with power to appoint her succe-provided that no child should be born-him, in which event the superintendence-to revert to such child.

By a second deed of the same date, Po-Bibee, the plaintiff, appointed her husba-Abdool Huq, *mutawalli* of 788 beeghas-cottahs 5 chittacks, her separate property, fo-purposes similar to those set out in the deed-1238, and with succession to his descendants,

with power, in default of children, to ate his own successor.

eghas 495 out of these 788 beeghas away to third parties under a decree of so that his deed applies to beeghas 5.

Assin 1277, Abdool Huq and his three Poran Bibee (the plaintiff), Miriam-issa, and Kiyam-oon-nissa, entered into reement, in which the three above-men- deeds are recited, together with similar ements for other properties not includ- this suit, and in which the two last- oned ladies are interested. By this ent they undertook to carry out the of the earlier deeds, with certain ad- , and to apply the surplus to the nance of the family, including Puddo , a grand-daughter of Golam Shah, and ildren, and to pay Rs. 50 per annum to Bibee, and 25 each per annum to the two wives of Abdool Huq, and to apply lance to the acquisition of land to re- the 495 beeghas lost out of the 788 as originally appropriated by Poran .

is deed then provided that the four s executing it should be, during their lives, *mutawallis* of the whole of the s appropriated by the five several acts tioned, with survivorship so long as any of the four should remain alive, and for tual appointment of a successor. The aining provisions are immaterial to this .

Four months later—in Phalgoon 1277—a ond agreement was executed amending former. The material parts of this are, t, in respect of the properties affected by deeds of 1238 and 1261, the superintend- ce was restricted to Abdool Huq and oran Bbee or the survivor during their es, and that a schedule was annexed de- ing the particular objects to which the ofits derived from the lands were to be applied, and the amount to be expended on each.

The plaintiff alleges that, in accordance with these deeds, she and her husband, during his lifetime, held the property severally entrusted to them; that after his death she held them for some 6 months, and was then forcibly ousted and expelled from the family dwelling-house by Abdool Khalek, the principal defendant (appellant), who is the son of Ali Buksh, a half-brother of Abdool Huq.

The defendant replied that the suit could not proceed without sanction of Government under Act XX. of 1863; that it was barred by limitation; that he never ousted the plaintiff, but, on the death of his uncle, undertook the management of the family-property with the consent of all his widows; that the deeds on which plaintiff relies are not genuine, and, if genuine, are void under Mahomedan Law; and he winds up with a statement that the estate of his grandfather (Golam Shah) devolved on Abdool Huq and Ali Buksh jointly; that, the latter being in Government service, the former had the management of the whole on behalf of the family; that in 1274 the post held by Ali Buksh was abolished, and he returned home, but died within the year, and Abdool Huq continued to manage these properties, *together with a small property obtained from the plaintiff under a hiba*, until 1278, when he died, and thereon defendant himself, with the consent of the plaintiff and other widows of Abdool Huq, assumed the management, undertaking to pay certain monthly allowance to them.

The Subordinate Judge found for the plaintiff on all points, except as to a claim for damages to which no allusion has been made above, as it has dropped out of the case.

The defendant has brought the cause up to this Court in appeal. He contends that

the suit cannot be maintained without sanction of Government; that it is barred by limitation; and that plaintiff has failed to make out a title sufficiently to warrant any decree in her favour.

At an early stage of the hearing, it was admitted that in respect of 293 beeghas 3 cottahs 5 chittacks, the residue of 788 beeghas 3 cottahs 5 chittacks dealt with in Poran Bibee's deed of 1261, the plaintiff must succeed, as this was originally her own property, and the right of appointment is vested in her, even supposing Abdool Huq's nomination of herself should be inoperative. All that we have to deal with is the property mentioned in Abdool Huq's deed of 1261. We think that the Subordinate Judge was right on the evidence before him in finding that the deeds of 1238, 1261, and 1277, were all genuine; the evidence will be briefly reviewed hereafter.

The property with which we are concerned consists partly of property originally belonging to the father and mother of Abdool Huq, and partly of property acquired by himself. As to the latter, his power to appoint is also beyond question, so that the real contest is as to the 428 beeghas 5 cottahs 8 chittacks said to have been appropriated to religious and charitable uses in 1238 by Golam Shah and Dowlut Bebee.

The power of Abdool Huq to appoint a successor during his lifetime is denied; and it is said that such power could only be exercised on his death-bed, and there is a passage in Baillie's Digest, p. 594, to that effect: "A superintendent, while alive and in good health, cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust." What these last words mean is nowhere very clearly defined; but, in the Futwa delivered by the Law Officers in the case of Mahomed Sadik *vs.* Mahomed Ali, 1 Select Reports, S. D. A., p. 22, it appears that it implies permission on the part of appropriator to confer the office on an at any time.

In the deed of 1238, by which Ab Huq is appointed, it is said that appropriation to his *own* use of the sa proceeds of the estates shall be legal lawful to the superintendent and his cendants, but he and they have no po to alienate.

The term used is "owlad," which im lineal descendants or offspring. It can was the intention of the founders to the enjoyment of the office and emolum thereof to Abdool Huq and his lineal desc ants, and admittedly the intention was d ed by his remaining childless.

If the deed of 1238 is taken to be creating a "wuqf," no right to the offi superintendent can devolve on the defend the nomination to it may possibly be v in the ruling power; if, on the other h the deed was intended to operate as a of property with certain duties and condi attached, it was clearly open to Ab Huq (in the absence of children) to ma over, subject to such duties and condi to whomsoever he pleased. Some relia was placed on the clause restraining alienation in any form, but this is undo edly meant to guard against alienation the subject of the appropriation, and has reference to the office of superintendent.

In neither case can the defendant h any interest under the deed; the only ques is, whether the plaintiff can, in the first c put forward any claim, as her appointme does not come from the ruling power.

It must be conceded that the appointme of his wife by Abdool Huq was originally unauthorized, and that he might have bee compelled by any one having an interest in the matter to exercise in his own person the functions entrusted to him; he could not, so long as he was in health and capable of

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charging the duties und undertaking responsibility of the office, divest himself responsibility by such an unauthorized nsfer as he actually made.

No one interfered, however, and by the eement of 7th Phalgoon 1277, it was anged that, in the event of the death of ran Bibee, in the lifetime of Abdool aq, the power of appointment of a succes- r given to her by him in 1261 should be abeyance; and that the superintendence uld revert to him, so that it is clear that re was no intention to defeat the purposes the original appropriator; and this same ed shows that at the time while he nfirmed the existing arrangement, he also effect made a testamentary disposition if ere was anything for it to operate upon: Of us the two *mutawallis*, whoever will ive the other, will hold the properties vered by the said two *towleyutnamas*, and form the acts prescribed therein," and there is no reason to suppose that there as any change of intention up to his death, may be fairly inferred that the appoint- ent of Poran Bibee as his successor as his expressed wish up to his last lness.

We therefore think there is no defect in laintiff's title, even if the property be rictly "wuqf."

The objection founded on Act XX. of 1863 was properly overruled by the Subordinate Judge. This is not a suit to establish a right of succession on a vacancy of the office of superintendent (s. 5), but a suit by one who claims to be vested with the office to bring into her possession certain properties which, by virtue of that office, she is entitled to hold, and which are wrongfully occupied by the defendant.

The plea of limitation is also untenable. If the defendant's version of the facts were true, no doubt there would have been no possession by the plaintiff, but, unless we accept that version, there is nothing to show that the possession of the husband was in any sense adverse to his wife. It may very well be that the entire management of the property devolved on him, but, when we find him up to the year before his death recognizing the right of the plaintiff, we must hold that he was merely the agent of his wife in respect of the properties of which he had assigned the care to her.

The deeds of 1261 are sufficiently proved by evidence of witnesses examined in this case, and so are the deeds of 1277. The most important deed is that of 1238.

Without attaching quite so much credit to the statement of the plaintiff as the Subordinate Judge has done, we think there is no reason to doubt that she was speaking the truth when she spoke of having seen this deed for many years.

The deed of 1261 (1854) recites it, and that deed was produced in Court so far back as 1859.

The plaintiff swears that she had from time to time custody of the deed before 1854, and there is no indication of anything occurring at or about that time to account for the concoction of a fraudulent instrument.

It purports to have been certified by a Kazee, whose handwriting is identified by the witness Abdool Wajed. The deed of 1238 alludes to an earlier deed of 1227 by which Golam Shah had made provision for Ali Buksh and his sister, children of his second wife. This of course might be introduced by a forger, but, in the first place, the object of such introduction is difficult to see; and in the second, there is no doubt that Ali Buksh did hold lands in the villages in the second schedule of the deed of 1238 (all but 3 villages) corresponding with the recited gift to him; the documents P and Q prove this. The difference of 3 beeghas is not of material importance. He

himself appears to have made title to these lands under the above-mentioned gift of 1227.

The fact that Ali Buksh so held separate property derived from his father (from Dowlut Bibee he would inherit nothing, he being son by another wife), and continued to hold it up to his death, is perfectly consistent with plaintiff's case. The gift is not necessarily inconsistent with his taking a share in the estate of Golam Shah, but defendant's conduct in respect of this gift is very suspicious.

It is to be noticed that the defendant has not shown the deed of gift of 1227 to prove that it was not intended to operate as suggested by the deed of 1238 as a sufficient provision for the family by the second wife, and that in his written statement he is altogether silent about this gift. The written statement is so framed as to lead to the belief that the defendant's father Ali Buksh, Abdool Huq, and the rest of the family succeeded to the entire property of Golam Shah in accordance with the rules of succession among Mahomedans.

This silence too has a material bearing on the oral evidence adduced by defendant. It tends to give a false colouring to evidence of joint possession of Abdool Huq and Ali Buksh. It is manifest that there may have been joint possession in the villages without any community of interest in the property held by Golam Shah after 1227.

The evidence of possession by the plaintiff, after the death of Abdool Huq, is open to criticism, and we do not rely upon it. It may be as false as the evidence by which defendant seeks to make out consent by the widows to his managing the whole property in consideration of the payment to them of some small monthly allowances.

We perhaps ought not to pass by in silence the attempt by defendant to turn the deed of 1261 by plaintiff in favour of her husband against her. In his written sta he speaks of this as "the small property was obtained from the plaintiff un hibba" by his uncle. No hibbana produced or even described, but i necessary for his purpose to take awa plaintiff the 293 beeghas of her own s property in order to give some co the alleged arrangement for a month ment.

We see no reason for disturbi decree of the lower Court, and acco dismiss this appeal with costs.

The 11th July 1876.

Present:

The Hon'ble W. Markby and W McDonell, *Judges.*

Limitation—Keeping alive a Decr

Case No. 32 of 1876.

Miscellaneous Special Appeal fro order passed by the Officiating J Zillah West Burdwan, dated th November 1875, reversing the or the Moonsiff of Gungajulghat, the 22nd of September 1875.

Rajah Nilmony Singh Deo Bahad (Decree-holder), *Appellant,*

versus

Nilcomul Tuppadar (Judgment-deb *Respondent.*

Baboo Gopeenath Mookerjee for App

Baboo Tarucknath Sen for Respond

When proceedings have been taken subseque application to execute a decree, and to the notice, limitation does not run from the date subsequent proceedings, but from the date of application to execute the decree, or from the the notice, as the case may be.

A judgment-creditor, on finding that his jud debtor has no property on which he can lay ha the purposes of execution, can always file an a tion simply to keep in force his decree.

Markby, J.—We think this case is erned by the Full Bench decision rep

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in 10 W. R., page 8, and the decision of a Division Bench in 23 W. R., page 282.

The Full Bench decision is to the effect that, if a decree has once been completely barred by limitation, it cannot be revived by the subsequent proceedings taken upon it. It has, however, been also always held that, when subsequent proceedings have been taken, more specially when they have been so taken that a portion of the decretal amount has been realized, the Court will always presume, if it possibly can, that the decree is not barred. That was suggested by Mr. Justice Jackson when the Full Bench decision was given. But the Court below found it impossible to apply that presumption in this case, because, even admitting that the facts are such as are suggested, yet, under the new Law of Limitation, it is impossible to say that this decree was not barred when the last previous application to execute the decree was made, namely, on the 29th December 1873. The application previous to that was made on the 10th September 1870, that is, more than three years previous, and according to ordinary course the notice would issue upon the same day. The only doubt suggested is that it is possible that, subsequent to that date, and within three years of the 29th December 1873, further proceedings in execution by issuing an attachment might have taken place. But the case in 23 W. R. decides that, under the new Law of Limitation, when proceedings have been had subsequent to the application to execute the decree, and to the issue of notice, limitation does not run from the date of any such subsequent proceedings, but only from the date of the first application to execute the decree or from the notice, as the case may be. That is a decision of a Division Bench of this Court, in which Mr. Justice McDonell was a party, and I should not feel justified in departing from it. The only observation that I wish to make is this: That I am not sure that the consequences which Mr. Justice Jackson has pointed out will follow from this construction of the Act. No doubt it will render it necessary, on the part of the judgment-creditor, that he should be more diligent than before in executing his decree, but, if he should find that there is no property of his debtor upon which he can lay his hands for the purposes of execution, he can still, as soon as he has exhausted that property or even before, if necessary, file an application simply to keep in force his decree should there be the slightest danger of its being barred by limitation. The law merely says that he is to file an application to enforce or to keep in force the decree or order, and this he can do whenever he likes. Acting upon the decision in the 23 W. R., we think that we ought to hold that the decision of the Judge is in accordance with the law, and the special appeal will be dismissed with costs.

The 11th July 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble Romesh Chunder Mitter, *Judge*.

Damages—Trespass—Burden of Proof—Continuance of Trespass—Malicious Trespass.

Case No. 131 of 1875.

Regular Appeal from a decision passed by the Subordinate Judge of Zillah Tirhoot, dated the 18th of February 1875.

Juggut Lall Chowdry and others (Plaintiffs), *Appellants*,

versus

Shaikh Tasudduck Ali and others (Defendants), *Respondents*.

Baboo Mohesh Chunder Chowdry for Appellants.

Mr. R. E. Twidale for Respondents.

Where plaintiffs sought to recover damages for some injury done to their property by an embankment raised by defendants, and pleaded that, on a former occasion, on which they had sued for damages against the same defendants for the same trespass, they had obtained a decree, and that the renewal of the offence was a continuance of trespass, FOUND that the plaintiffs, on whom the burden of proof of injury lay, had failed to sustain it by proving specific loss; and HELD that they were therefore not entitled to a decree:

HELD also that the precedents quoted, in which decrees for substantial damages had been given on proof of malicious trespass, although specific injury had not been established, were inapplicable to suits like the present, in which the essence of the plaint was a demand for compensation for losses actually incurred, and in which no hint was thrown out of any malice in the alleged act of trespass.

THIS was a suit to recover damages, which the plaintiffs said they had sustained in consequence of an embankment which had been placed by the defendants on the plaintiffs' land near the boundary line of their respective properties, which had the effect, as the plaintiffs said, of throwing the flood water in the rains back upon their lands, and preventing their cultivation of paddy. It seems that a former suit had been brought by and against the same parties complaining of this very embankment, and praying that it might be removed; and in that suit the question was raised whether the defendants had any right to place the embankment there. That question of right was decided in favour of the plaintiffs; and the Court directed the removal of the embankment, which was accordingly removed in June 1871. The suit is now brought in consequence of a continuance of the same trespass since the commencement of the former suit, and to recover the actual loss which the plaintiffs say they have thereby sustained, and the onus of provi the amount of that loss lies of course up the plaintiffs.

The learned Judge in the Court bel appears to have gone very fully into t case. He directed two ameens to sur the ground, and he went carefully throu the evidence with the ameens' reports bef him. He found that the plaintiffs had n tained no damage at all, and had co pletely failed to make out their ca That being the finding of the Subordin Judge, who had the means of investigati the facts, and testing the evidence of t witnesses, which we have not, we ought see our way very clearly before we o rule his judgment. We have given t best consideration to the case, and t result is, that we think that the lear Judge came to a very proper conclusi The evidence of the plaintiffs' witnesses, which our attention has been called, was n only contradictory in itself, but also to t case which was set up by their own plea He stated that their loss was occasion by their not having been able on account the flood to sow or plant their paddy. In the first witness who was examined, t plaintiffs' own putwari, stated that pad was actually sown on the whole of th plaintiffs' lands, and that the way in whi the damage occurred was not by the plain iffs being unable to sow or plant the padd but by the crop, after it had grown to th height of a man's waist, being destroy by the floods. This he said occurred in each of the years for which damage wa claimed, *viz.*, in 1278, 1279, and 1280. The next witness is a man who looked after the entire cultivation of the plaintiffs' lands; and he states that in 1278 no paddy was sown or planted at all. The next witness, who was a cultivator in the said mouzah, said that none was sown in 1278 or 1279; and the fifth witness said the same

ing. The evidence, therefore, of these nesses is directly opposed to that of the st witness, who stated that paddy was wn and planted in each year, and that it ew to the height of a man's waist. hese are very serious contradictions upon e most material points in the case. sides this, the ameens' reports, which ppear to be very full, and which the parties id before them at the time when they amined their witnesses, are distinctly opposed to the case of the plaintiffs; for, hereas their case is (and every single ness produced by them states, and in uch the same language) that the floods in ch year rose to the height of a man's reast, it appears from this report that e embankment was in no place higher an 3 feet, and in many places only a few ches high; and therefore, if the water rose the height of a man's breast, it could not ve been in consequence of the embankment. The ameens, who appear to have ken levels, and to have conducted their rveys in a careful manner, say that is impossible for the land to have een flooded in the manner described. hen there is another point, which is ticed by the Subordinate Judge, and hich is undoubtedly entitled to great eight. The plaintiffs, when they found hat their witnesses contradicted one another so materially, might themselves have given evidence, and explained the whole circumstances of their loss, if they had really sustained any; and yet not one of them dared to go into the witness-box. Looking, therefore, at all these facts, we fully concur with the Subordinate Judge in the conclusion at which he arrived. But then it is contended, on behalf of the plaintiffs, that, although they may have failed to prove any actual loss, they are still entitled, if they prove a continuance of the trespass, to substantial damages, and in support of their view our attention was called to a case in Vol. X., Moore's P. C. Reports, page 563. That was a case in which the plaintiff's property had been attached, and he brought a suit against the persons who had issued the attachment, alleging that he had sustained special damage in various ways. He failed to prove that special damage, and the Courts in this country held that, having so failed, he was not entitled to recover any damages at all. The matter was then brought before the Privy Council, and their Lordships considered that it was one of those cases in which the defendant, who put in the attachment, was fully aware that he had no right to do so, and that his act was in the nature of a malicious trespass, and therefore, although no definite amount of damage had been proved, their Lordships considered that the plaintiff had sustained some damage, and gave him a decree for Rs. 500. But this case is wholly different from that and from a great many other cases which might have been cited, in which plaintiffs have been held entitled to recover substantial damages, where there is any element of malice or annoyance or insult in the defendant's conduct. In all such cases no doubt a man may recover heavy damages, although he proves no special loss. There is one very well-known case in England, mentioned in Mr. Mayne's Book on Damages, where a nobleman insisted upon trespassing upon his neighbour's land, to his neighbour's great annoyance, in pursuit of game. An action was brought against him for the trespass, and the Jury gave a verdict for £500 damages, and the Court refused to disturb the verdict on the ground that it was an act of malicious trespass committed for purposes of insult and annoyance, and that, consequently, the Jury were justified in giving heavy damages. But, in this case, there is no element of

insult, annoyance, or malice of any sort or kind. The plaintiffs in their first suit sought to establish their right, as against the defendants, to have the embankment removed. It was not pretended that the defendants had put up the embankment maliciously. They probably placed it there to protect their own lands from being flooded, and, for aught that appears, they believed they had a right to do so; and when the plaintiffs brought their first suit they never suggested that the defendants had put up the embankment with any malicious intent. They succeeded in establishing their right; and the embankment was removed in June 1871. The present suit is then brought confessedly to recover *the actual loss which the plaintiffs said they had sustained;* and unless they can establish their ground of claim, they ought to receive nothing. To give them substantial damages in such a case for a continuance of the same trespass, which has already been made the subject of one suit, would be to encourage useless litigation. Under these circumstances, although there was no doubt a continuing trespass on the part of the defendant after the commencement of the first suit, which of itself constituted a wrong, and which would have afforded a substantial ground of claim if the plaintiffs could have established any actual loss resulting from it, still, as they have failed to prove any real loss, we think their claim for damages ought to be disallowed.

This appeal must be dismissed with costs.

The 12th July 1876.

Present :

The Hon'ble W. Ainslie, *Judge.*

Limitation—Evidence—Point of Law.

Case No. 108 of 1876.

Special Appeal from a decision passed by the Officiating Judge of Zillah Jessore, dated the 16th August 1875, reversing the decree of the Moonsiff of Chen Jhenaidaha, dated the 1st of A 1875.

Gobindo Chunder Moulick and another (Plaintiffs), *Appellants,*

versus

Mudhoosoodun Moulick and others (Defendants), *Respondents.*

Baboo Joy Gobind Shome for Appellants.

Baboo Juggut Chunder Banerjee for Respondents.

A person who complains that he has been dispossessed of land, but cannot prove that he has not been out of possession for more than three years, is debarred by limitation from suing for recovery of possession.

A Judge's reason for rejecting evidence may be an error in law.

THE plaintiff in the present suit sued to recover possession of certain lands, he having admittedly been out of possession since 1865, when the defendant obtained a decree for rent against the tenants. The first Court gave plaintiff a decree. The Lower Appellate Court has reversed that decree, and dismissed the suit on three grounds—*First,* that the suit is barred by the special law of limitation as laid down in section 77, Act X. of 1859; *second,* that it is barred by the general law of limitation; and, *third,* that the plaintiff has made out no title.

As to the *first* of these grounds, it is quite clear that the Judge is wrong. It is only necessary to refer him to the Rulings in 5 Weekly Reporter, pages 85, 87, & 92, Act X. Rulings. The *third* point it is unnecessary to consider.

It appears to me that the judgment on the *second* point cannot be interfered with. Taking the passage which commences, "Whatever may be the case, it is evident "that since 1865 plaintiff has been *out of* "possession," it is clear that the finding of the Judge is this, that certain witnesses, who now come forward and say that the plaintiff

in the receipt of rents prior to 1865, e disbelieved when they made the same tement before the Deputy Collector in 66, and that, even if they were not disbelieved, he sees no reason to believe them w, because the conduct of the plaintiff is olly inconsistent with the truth of their tements. Then he goes on to say that the idence of possession is miserably poor.

In this evidence he fails to discover anying that satisfies him; that, for three years fore 1865, the rent of the land had been eived by the present plaintiff.

The only ground on which there has been attempt to disturb this finding of fact is, at the reasons upon which the finding of e Judge is based are erroneous in law.

A case reported at page 165 of the 17th eekly Reporter is cited as authority for s contention, and there is no doubt that in at case the Judges held that there was an or in law in rejecting the evidence, *ause the witnesses were weavers by caste.*

The present case, however, is distinguishble. The Judge has read the evidence, the light thrown upon it by the conduct the plaintiff, and the inference drawn is ot an unreasonable inference.

Under these circumstances, the Court sees o reason to interfere.

The appeal is dismissed with costs.

The 13th July 1876.

Present:

The Hon'ble W. Markby and W. F. McDonell, *Judges.*

Co-defendants—Essential Issue—Accidental Issue—Claim for Wasilat—Possession.

Miscellaneous Regular Appeals from an Order passed by the First Subordinate Judge of Bhaugulpore, dated the 15th February 1876.

Case No. 118 of 1876.

Khajah Mahomed Isa Khan (Judgment-debtor), *Appellant,*

versus

Mothoora Dass (Decree-holder), *Respondent.*

Baboo Amarendro Nath Chatterjee for Appellant.

Mr. M. L. Sandel for Respondent.

Case No. 119 of 1876.

Mussamut Boollakun (Judgment-debtor), *Appellant,*

versus

Mothoora Dass (Decree-holder), *Respondent.*

Baboo Boodh Sen Singh for Appellant.

Mr. M. L. Sandel for Respondent.

Where a plaintiff obtained a decree against several defendants, only some of whom had appeared in Court, and subsequently proceeded against them for the wasilat, which the first decree declared him to be entitled to recover; and two of the defendants, who had originally failed to appear, obtained orders from the Court for what was practically a rehearing on the merits—the one on the single issue, whether he had been in possession on a certain date; and the other, on the double issue, whether she had been in possession on a certain date, and whether she had been in possession of a particular share—and the first defendant, having been thrown out on his single issue, made the other defendant's contention a precedent, and sought to have another hearing on the second issue, FOUND that the rehearing of the second defendant's appeal on two issues arose out of the fact that two pleas were urged in her petition, but that the Court had not expressed any opinion on the importance or essential character of those pleas; and HELD that, as the first defendant's case had rested all along on his denial of possession prior to a certain date, the question of the particular shares held by several defendants was one that was to be settled amongst themselves, and could not come between plaintiff and his claim against first defendant under the old decree.

IN this case, in consequence of the length of time during which the litigation has lasted, and the great variety of orders that have been made, there is some little difficulty in ascertaining really what the matters in dispute between the parties are.

It appears that, so long ago as 31st August 1863, a decree was obtained in this Court by Mothoora Nath Dass, the present judgment-creditor, against twelve persons—six of whom had appeared and defended the suit, and six of whom had not appeared at all. The plaintiff had originally claimed a considerable share of the property, but he obtained a decree only for a much smaller share which he was declared entitled to

recover with wasilat. The plaintiff got into possession of the share to which he was entitled under the decree on the 10th July 1865. He subsequently took proceedings to recover his wasilat. The present appellant Isa Khan was one of the parties who did not appear. Having been directed to pay wasilat, he appealed to this Court; and this Court, on the 23rd January 1873, upon an objection taken by him, decided that he was liable under the decree, because the plaintiff clearly charged him jointly with others with having ousted him from the property. The Court goes on to observe that, if he did not choose to appear in the suit, his plea, that he had not been in possession, could not be listened to. Subsequently to that, this Court, upon a petition of review, seems to have modified the review of the liability of Isa Khan under the decree to this extent. The learned Judges who heard the case appear to have come to the conclusion that Isa Khan would not be liable under the decree, if he could prove that he did not acquire his interest in the property until the year 1268, and that he was never in possession of the property benami or otherwise prior to that date. The Court thought that, upon proving this to the satisfaction of the Court, he should be absolved from any liability to wasilat. To that extent, the learned Judges modified their previous decision upon the question of Isa Khan's liability. Simultaneously with, or shortly before, that, upon the appeal of another of the defendants in the original suit, namely, Mussamut Boollakun, the Court had directed a remand in her case, and in their judgment they say that the grounds taken by Boollakun were that wasilat had been claimed for a period during which she was not in possession; and also that, if she was in possession at all, she was not in possession of the share of Rossool Khan, that being the share which had passed by the sale to the plai[illegible] The argument now is that, inasmuch [illegible] the Court thought fit in Boollakun's ca[illegible] remand both these points for the consid[illegible] tion of the lower Court, both those po[illegible] ought to be considered in the case of [illegible] Khan also. As a matter of fact, in the ca[illegible] Isa Khan, the only question that has b[illegible] considered by the lower Court is whe[illegible] or no he was in possession at all be[illegible] 1268, and upon its being found that he [illegible] not come into possession at the time [illegible] alleged, namely, in 1273, when he nomi[illegible] purchased, but that he really came i[illegible] possession in 1258, when the sale was m[illegible] of the share of one Mokim, of which h[illegible] found to be the real, although not the no[illegible] nal, purchaser, his name is included in [illegible] decree. It is now admitted that that fa[illegible] ing of fact cannot be contested in appe[illegible] and therefore the only question that rem[illegible] to be considered in Isa Khan's case [illegible] whether or no the other point, nam[illegible] whether he was in possession of the sh[illegible] of Rossool Khan, is necessary to be inqu[illegible] into in this case.

Now, the reason why it is necessary [illegible] us to consider in Isa Khan's case what [illegible] Court really meant to say in Boollakun's ca[illegible] is, because it is not likely that the Co[illegible] when construing one decree, intended [illegible] give it a different effect in one case fro[illegible] that given to it in the other; and if it [illegible] appeared from the judgment in Boollakun's case that the Court thought that it was [illegible] material question to be determined whether or no the share which she was in possession of was the very share which the plaintiff had recovered—if that was clearly the opinion of the Court in Boollakun's case—we should be very unwilling to put a different construction upon the opinion of the Court in Isa Khan's case. But Mr. Sandel's contention, which is a very reasonable one, is that, when the Court remanded Boollakun's case, they

did not express any opinion as to the importance or value of the question raised by her; they merely found this, that there was a petition upon the record put in by her; and as she was one of the persons made liable for mesne-profits, and that petition raised two questions, the Court must dispose of those two questions before any decree could be made against her. But that might be either by determining those questions, or by showing them to be not material. The Court did not consider the questions, or pledge itself to any opinion that either of those points was a point of importance. If it had done so, undoubtedly the order which was made a few days afterwards in Isa Khan's case would have contained precisely the same directions as those given in Boollakun's case. But this view is not only consistent with the judgment, it is also in accordance both with the law and the history of this case. It could make no difference in this case whether Isa Khan was in possession of the particular share of Rossool Khan or not. In fact, in a case of this nature, it would be almost impossible to ascertain that, and it is wholly immaterial in the view taken by this Court upon the question of the liability of Isa Khan, and which was only modified to the extent I have mentioned. The view taken was that all the persons who were in possession of that property had joined together in ousting the plaintiff; and, if that was so, they were all equally liable for the mesne-profits. Any question as to who was in possession of a particular portion of the property, and as to how much he was in possession of, will have to be disposed of amongst themselves in any suit that may be brought for contribution. This view is not only consistent with the law of the case, but the whole history of the case points to the same direction.

The sole contention, as far as we can see from so much of the proceedings as the parties have chosen to place before us, has been all through that Isa Khan was not in possession of the property at all, and that the property was purchased by Nujuff Ali, and afterwards by Bollakun, from whom Isa Khan purchased it, the whole contest being whether the original purchase was really a purchase on his behalf or not. After the order of remand, it appears that Isa Khan put in a petition, and the only question which he then asked the Court to determine was that general question, namely, whether he had a share in this property benami in the name of Boollakun, or whether the origin of his title began after the year 1268. Under these circumstances, we have no doubt that the Subordinate Judge was right in dealing with the only question which, in fact, he was asked to deal with, namely, whether the purchase was really a purchase on behalf of Isa Khan, or whether he purchased from her in 1268. Therefore, so far as Isa Khan is concerned, the whole question in issue has been tried, and the appeal, so far as it relates to Isa Khan, must be dismissed with costs. With regard to Boollakun, it appears to us that, as soon as it was found that she only held the property benami for Isa Khan, then, in accordance with the principle laid down in the remand-order of this Court, she, not being in possession really on her own behalf, but only holding benami for Isa Khan, ought not to be made liable under this decree. Whether or no that view is correct it is not now material to inquire, because Mr. Sandel has not pressed before us to order the decree to be executed against her. Her name, therefore, will be struck out, and so far the order of the Court below will be amended.

The only question is how the costs will be disposed of. We think that, under the circumstances of the case as between Boollakun and the judgment-creditor, each party should pay its own costs in all the Courts.

The 14th July 1876.

Present:

The Hon'ble F. B. Kemp and E. G. Birch, *Judges.*

Khas Possession—Setting up Title—Onus of Proof—Stamp Law—Ticcadar.

Case No. 2020 of 1875.

Special Appeal from a decision passed by the Officiating Judge of Zillah Patna, dated the 15th of June 1875, affirming a decree of the Additional Moonsiff of that District, dated the 24th of March 1873.

Ram Sarun Sahoo and Jankee Sahoo for self and guardian of Ram Kalawan Sahoo, Ramphul Mahton, and Gunga Bishoon Rawut (Plaintiffs), *Appellants,*

versus

Veryag Mahton (Defendant), *Respondent.*

Moonshee Mahomed Yusuf for Appellants.

Baboo Gooroo Dass Banerjee for Respondent.

Plaintiff having sued for khas possession of the land in suit, contending that it was the only portion of a village which defendant, who had been holding it on a lease, had refused to restore on the expiry of the lease; and defendant having contended that he had purchased the land from third parties who had got their title from former proprietors, and that he had been holding a *kashtkaree* title under which he had obtained a right of occupancy, the High Court HELD that the onus of proof of the title which he was setting up against the zemindar lay on defendant, and remanded the case for decision after receiving evidence on the point.

The lower Court having sent back the case, after finding that the land in suit was divided into two parts, the purchase of one of which had been clearly proved by the defendant, who, moreover, had acquired a right of occupancy in the other part, the purchase of which he had not proved, and holding that the defendant was thus entitled to possession, HELD by the High Court that defendant was entitled to retain possession of the part the purchase of which he had proved, but that plaintiff must obtain possession of the remainder, and that the costs must be divided proportionately.

A plea set up by the plaintiff, that the deed of sale filed had been originally unstamped, and that the lower Court was incompetent to supply the deficiency of the stamp by paying the penalty in the appellate stage of the suit, was overruled.

It having been found that the defendant had been holding as ticcadar that part of the land which he had not purchased, HELD that a ticcadar is bound to restore his holding to the zemindar in the condition in which he got it when his lease is over.

Kemp, J.—THIS case was remanded by this Bench on the 26th of February 1875. We were of opinion that the case had been decided on a wrong principle by both the lower Courts, and we held that the plai iffs were admittedly zemindars or mali that the defendant did not deny that was the plaintiffs' lessee; that the pla iffs alleged that the mouzah, includ all the lands appertaining thereto, had b leased to the defendant; that amo these lands were certain zeraet lands: on the expiry of the lease the defend gave possession of all the lands with exception of the zeraet lands which form subject of the suit; and that the plai therefore sued for khas possession of t lands. We also stated that the defend had set up a special allegation that was holding these lands by purchase f third parties, deriving their title from former maliks; and that the title which the defendant claimed to hold w *kashtkaree* title, which, he alleged, g him a right of occupancy. We furt held that the onus was clearly on defendant who was setting up a title defeat the plaintiffs' admitted right zemindar, and that it was for him prove the tenure which he set up defeating the plaintiffs' right as malik khas possession. The case was, therefo sent back to the Judge with directions to into the case of the defendant, and to dec it after considering the evidence adduc by him in support of his alleged title.

On remand, with reference to 47 be ghas out of the 107 beeghas, the subje of suit, the Judge found that the defendan had proved his purchase from the form maliks; and, with reference to the remain ing 60 beeghas, that the defendant wa not able to prove his alleged purchase, but that he had acquired a right of occupancy. He, therefore, was of opinion that the question in the case, namely, whether the defendant had proved a case which was sufficient to prevent the plaintiffs' claim for khas possession, ought to be answered in

affirmative, and that he was bound to d that the defendant had proved his case. The plaintiff is the special appellant fore us, and the two points taken in cial appeal are, first, with reference to 47 beeghas, that the Judge should e held that the deeds of sale, dated the th and 20th Srabun 1265, for 32 beeas and 15 beeghas of land respectively, a total of 47 beeghas, were inadmisle in evidence, inasmuch as they did bear the proper stamp. With reference the 60 beeghas, the ground taken in cial appeal is, that the special appelt having purchased at a sale for arars of Government revenue, the former oprietors had no title of any sort to sert against the special appellant, or to vey to the defendant; that, even if the fendant cultivated any land, which the cial appellant denies, he cultivated as cadar, and that, in resisting the pre-nt suit for khas possession, the defendt cannot rely upon any possession held him during the period he was a ticcar, and that cultivation under such pacity would not give him a right of cupancy, or, in other words, a right so to defeat the claim of the plaintiffs for has possession.

With reference to the first ground no thority was quoted by the pleader who ppears for the special respondent as to he Lower Appellate Court not being competent to direct the party who filed the eeds of sale to supply the deficiency of tamp in the appellate stage of the case. These documents were admitted in the first Court without objection, and the Judge permitted the special respondent to pay the additional stamp-fee required under the Stamp Law. There is one decision on the point in 23 Weekly Reporter, page 170, in a case decided by a single Judge sitting on special appeals under 50 rupees in value. Mr. Justice McDonell, the presiding Judge in that case, held "that it has been frequently held by this Court that a document once received without objection should not be rejected on appeal when the irregularity is one not affecting the merits of the case under section 350 of Act VIII. of 1859." The stamp there was deficient, and the deficiency was allowed to be made up in the appellate stage. Then there was a case before their Lordships in the Privy Council, which is to be found in 17 Weekly Reporter, page 554. Their Lordships there observed that "considerable, and perhaps undue, laxity in admitting documents has been sometimes allowed by the Indian Courts; but their Lordships consider that, whilst it may not be desirable in all cases to apply strict and technical rules to the admissibility of evidence in the Courts in India, the substantial principles on which the authenticity and value of all evidence rest should be observed." Now, the Judge in this case found that these documents were authentic documents, and had been executed by the former maliks at a period prior to the purchase of the special appellants. He, therefore, held that the objection was a technical one made at a late stage of the case, and that it could not in any way affect the merits of the case. We, therefore, overrule the objection as to the inadmissibility of these documents as evidence, and confirm the Judge's finding with reference to the 47 beeghas. With respect to the 60 beeghas, we differ from him. It has been held in a case decided by this Court on the 6th of April 1876 by Mr. Justice Glover and Mr. Justice Pontifex "that a purchaser at a Government sale for arrears of revenue" —which is the position of the plaintiffs in the present suit—"is entitled to all the lands situate within his purchased pro-

perty." And we may observe here that this principle is also laid down by their Lordships in the Privy Council. The learned Judges go on to say that "the onus would lie heavily on the defendants to show that in that estate they had a right of occupancy which would prevent the plaintiff entering into khas possession." It was said in that case, as in this, that the defendant had admittedly been in possession for some years as under a ticca lease. And the Judges then observed that the ticca lease would not confer a right of occupancy on the lessee, however long it lasted. It appears to us that, following that ruling, a ticcadar cannot create any right in others, or by occupying as a ticcadar for a long period create any right in himself as against the zemindar. A ticcadar is bound to restore the lands to his zemindar in the same condition in which they were when the lease was granted. In this view of the case, we reverse the decision of the Judge in respect of the 60 beeghas, and hold that the plaintiff is entitled to khas possession of these 60 beeghas. His decision with reference to the 47 beeghas, the sale of which is proved, and which sale took place anterior to the purchase of the plaintiff, will be affirmed. The decision is modified to the above extent with costs in proportion.

Birch, J.—I concur.

The 17th July 1876.

Present:

The Hon'ble W. Ainslie and W. F. McDonell, *Judges.*

Landlord and Tenant—Instalments of Rent—Double Payment.

Cases Nos. 1782 and 1793 of 1875.

Special Appeals from a decision passed by the Second Subordinate Judge of Zillah Backergunge, dated the 28th May 1875, modifying a decree of the Third Sub-Moonsiff of that District, dated the 17 August 1874.

Surreshoollah (Defendant), *Appellant,*

versus

Ram Coomar Goopta (Plaintiff), *Respondent.*

Baboo Grija Sunker Mozoomdar for Appellant.

Baboo Kashi Kant Sein for Respondent.

Where an execution-sale conveyed away a landlord's rights, and the question, whether the interest conveyed away existed separately from the parent estate, or survived the sale, or existed dependently on the parent estate, and went with the sale, was decided in favour of the plaintiff, HELD that the claim must be treated as though it had been brought by the original possessor if no sale had taken place; and that, if defendant by acting on his own judgment, made himself liable to pay twice over, he must bear the consequences of his own mistake.

Where it does not appear that rent is payable in instalments, it must be assumed to be payable annually.

Ainslie, J.—THE plea of the defendant that the relation of landlord and tenant does not exist between the plaintiff and him, is not maintainable. Gopal Khan was admittedly the owner of the howla and the party entitled to the rents until his title was determined by the execution-sale. The plaintiff is merely an assignee of the back rents said to have been due to Gopal. The title of the plaintiff as to part of the rent sued for certainly ceased from the date of the sale to Chunder Madhub. This was in Bhadur 1277, and probably there was no kist for the year 1277 then due; at any rate, it does not appear that the rent was payable in instalments, and we must take it to be a rent payable annually. Consequently the sale will bar the right of the plaintiff to recover for any portion of the three years to the extent of any interest of Gopal Khan conveyed by the sale. The only question in the suit was, whether there was any outstanding title in Gopal which is now vested in plaintiff, and we must deal with it as if Gopal was suing in his own name. The defendant is clearly entitled to raise the defence that his landlord's title has been

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extinguished entirely or in part by operation of law. The assertion of the plaintiff is, that there is in the zemindari a howla, Hyat Khan, of which Gopal held a one-fourth share. The defendant asserts that Gopal's quarter share of the howla was a distinct howla in plaintiff's 4-anna share of the zemindari, and that Chunder Madhub purchased it in execution of a rent-decree. Both the Courts concur in finding that the interest of Gopal in howla Hyat Khan is an interest in a single holding subordinate to the entire zemindari, and not an interest carved out of, and detached from, the original howla, and separately subordinate to a separated share of the parent estate. If this finding is correct, and in special appeal it is not open to question, the construction put on the sale-certificate is correct. It conveys Gopal's interest in howla Hyat Khan, appertaining to Neel Money Mitter's share in the zemindari. If, as found, a fraction of the entire howla, and not a separate minor howla, was in Neel Money Mitter's share, and Gopal had one-fourth of that fractional portion, the sale passed one-anna only. In speaking of annas in respect of this zemindari it is to be understood that 20th, and not 16th, parts are intended. The Lower Appellate Court has found as a fact that the estate was divided into 20 principal parts, which seem to have been called 20 annas, so that 4 annas is a one-fifth, and not, as ordinarily understood, a one-fourth, share of the whole zemindari. A one-twentieth share of the estate, which in the judgment is called a one-anna share, is, no doubt, in this view, only 16 gundas when expressed in the usual way in which the primary division is into sixteen parts. The first ground of appeal, to the effect that no decree could be made for a portion of the rent of the holding, was not taken in the Court below, although this objection applies to the judgment of the first Court as well as to that of the Lower Appellate Court. We cannot say that the Judge of the Lower Appellate Court was in error in not deciding that which he was not asked to decide. As to the objection that the defendant has been by this judgment made liable to pay twice over, we can only say that his position may be unfortunate; but if he made a mistake in respect of the extent of the share of Gopal which had passed by the execution-sale, and acted on his own judgment, he must bear the consequences of his own mistake. The appeal is dismissed with costs. The same judgment will apply to No. 1793.

The 31st July 1876.

Present :

The Hon'ble W. Markby and W. Ainslie, *Judges.*

Endowment — Surbarakari Right — Wuqf—Inalienable Right — Firman — Futwa — Inam —Intention of Founder.

Case No. 1889 of 1875.

Special Appeal from a decision passed by the Officiating Judge of Zillah Midnapore, dated the 22nd of July 1875, reversing a decree of the Subordinate Judge of that District, dated the 27th May 1874.

Syud Asheerooddeen *alias* Kalla Miah (Plaintiff), *Appellant,*

versus

Sreemutty Drobo Moyee, widow of Gudda Dhur Ghose (Defendant), *Respondent.*

Mr. Woodroffe and *Baboo Kally Mohun Dass* and *Moonshee Mahomed Yusuf* for Appellant.

Baboo Mohiny Mohun Roy, Moulvie Murhamut Hossein, and *Baboo Jugut Chunder Banerjee* for Respondent.

Where the mutawalli of an endowment sought to recover his surbarakari right in two villages, of which he had been dispossessed by a person who had obtained a decree against him personally, and taken out execution against the endowment; and the said judgment-creditor contended, *1st,* that the proceeds of the endowment had been appropriated to other purposes than those specified in the firman creating it; *2nd,* that, as the firman

contained no rule of succession by inheritance or otherwise, plaintiff could not claim to be mutawalli simply in virtue of his being a descendant of the original mutawalli; and, *3rd*, that the use of the term 'inam' in the firman showed that the grant was in the nature of a personal endowment: FOUND that the nature of the firman removed all doubt of the wuqf character of the endowment; and HELD, *firstly*, that the misappropriation of wuqf funds might form the subject of a suit to compel the mutawalli to do his duty, but could not alter the essential nature of his trust; *secondly*, that the question of the right of the plaintiff to succession could not, for the first time, be raised in this stage of the case; and, *thirdly*, that a grant should be construed according to the intention of the founder, and not according to the strict interpretation of any particular word, the word 'inam' being indiscriminately applied to personal grants and religious endowments.

Markby, J.—THIS was a suit brought by the plaintiff for confirmation of his surbarakari right in a wuqf property consisting of two mouzahs in the District of Midnapore. He asks to have it declared that this right is unsaleable, and he also asks to be confirmed in his mutawalliship of the wuqf property.

The dispute has arisen out of certain execution-proceedings taken by the defendant to obtain satisfaction upon a decree which she holds against the plaintiff. There was a sale in execution at the defendant's instance, at which the defendant became purchaser of some rights of the plaintiff in the two mouzahs. The parties are not agreed upon what was really sold, but in the view which I take of the case, it is immaterial.

The Subordinate Judge, upon issues properly framed, held that the two villages were wuqf, that the plaintiff was the mutawalli, and that the rights of the mutawalli could not be sold in execution.

The District Judge, on appeal, has found that the property was not wuqf.

The question before us is, whether the District Judge was right in this finding. It was expressly admitted before the District Judge that the appeal turned solely upon this issue.

In my opinion, the Subordinate Judge was right in holding the property to be wuqf. It appears by a recital in a firman granted by the Emperor Alumgeer in the year 1089 H. that prior to that time these two mouzahs had been appropriated for the purpose of meeting the charges of fakirs and students of the Mudrassa and the khankah and musjeed of Moollah Darvish Hossein. We don't understand it to be denied that this is sufficient to constitute a wuqf; but the firman goes on to command that the whole of these mouzahs shall continue, as they formerly were, at a jumma of 15,000 dams in the character of his "Maddad Mash" according to the term of the grant; and that in order that he may apply the produce of these lands to meet the charges of the students of his Mudrassa and musjeed. And the argument before us has been that the words "in the character of his Maddad Mash" show that the property was not wuqf, but that Darvish Hossein had some beneficial interest in the property, which might be seized and sold in execution.

In my opinion, it is not necessary to consider whether (as the District Judge seems to think) the term wuqf only applies where the property is devoted exclusively to charitable purposes, because, in my opinion, the property is exclusively devoted to the charitable and pious purposes mentioned above and the mutawalli takes no beneficial interest in it whatsoever.

I am quite satisfied to rest my judgment upon this point on the futwas of the Kazi-ool-Koozat, and of the mufti given to the Sudder Court in the year 1814 upon this very firman, which was accepted by the Sudder Court, and which is set out at length in a case reported in 6 W. R., P. C., p. 8. That futwa is as follows: "As in the firman it is written that the produce of the lands specified is to be applied to meet the charges of students of the Mudrassa and musjeed of Moollah Darvish Hossein, and as it is not written that the said Moollah shall appropriate the produce to meet the charges of his family and children, or that he shall enjoy the same with his family and

dren, it therefore appears to us that the ds in question has been fixed as wuqf in character of Maddad Mash, and are not le to sale or gift." I do not think we ht to depart from this construction, which been several times since acted on, and er questioned by authority prior to this t. There may possibly be some slight biguity introduced by the use of the word Maddad Mash," but nothing sufficient to tify us in reversing the decision of the lder Court.

The District Judge seems to rely to some tent on the fact that the profits of the uzahs are not now appropriated to the rposes indicated in the firman. But the appropriation of the proceeds cannot er the nature of the trust. If the mutalli does not do his duty, the proper urse will be to take legal measures to mpel him to do it, not to allow the proper to be applied to the satisfaction of his ivate debts. There is no similarity between this case and that in 3 W. R., p. 142, here the Court, having regard to the fact at the property had never been from the st in fact applied to religious purposes, t had been dealt with, even by the original grantor, just as if it were his own, held at the alleged endowment was a mere ham.

It was argued that, as the firman contains o rule of succession to the mutawalliship, e plaintiff, who shows no appointment, annot claim that office merely as descendant f the original mutawalli, Darvish Hossein. But I do not think that the defendant can now raise that question.

It was determined in the plaintiff's favour by the Subordinate Judge, and, though the plaintiff appealed against that part of the decision, he subsequently narrowed the matter to the simple issue above stated, and I do not think he ought to be allowed now to open any other question.

I do not consider, however, that we are bound to declare that the plaintiff is mutawalli of this property. The admission of the defendant, though sufficient to justify us in making a decree in this suit, would not justify a declaration to that extent.

There will be a declaration that the two Mouzahs Bishenpore and Mashumpore are wuqf property, and that the plaintiff has no beneficial interest therein capable of being seized and sold in execution; and that, if the defendant has taken possession of any part of the property, that the plaintiff do recover immediate possession thereof.

The plaintiff will be entitled to his costs in all the Courts.

Ainslie, J.—I concur in the judgment delivered by Mr. Justice Markby, and independently of the previous dealing with this firman by the Courts, I think the proper construction of the document is, that it was intended to create, and did create, an endowment known in Mahomedan Law as wuqf.

It recites that there had already been a grant of two villages to Moollah Darvish Hossein by the Governors of the province for certain religious and charitable uses; and it confirms and extends the grant by remitting the revenue assessed on those villages that the grantee might expend the income for the objects named, and the endorsement shows that it was on the representation that the petitioner was so applying his grant that the Emperor was moved to act.

It is said that the use of the words, *his Maddad Mash*, shows that the intention was to make an absolute gift to the individual with a condition or recommendation, and that the gift is valid, and the condition controlling it is void. The authorities referred to by Moulvie Murhummut Hossein are not parallel cases, and the rule of the Mahomedan Law there laid down is based on acknowledged principles; but in this in-

stance there is nothing repugnant in the condition, nor is there any qualification operating in favour of the grantor to change the nature of the transaction from a gift into a temporary concession of the enjoyment of the subject-matter.

That there is no particular force in the words used to describe a royal grant is to be gathered from the opinions of the law-officers in the case of Mussamut Qadira *vs.* Shah Kubeerooddeen, 3 Select Reports. In that case there were two firmans before the Court—in each the gift was described as *Inam Altumgha* to be enjoyed by the grantee (and his descendants) from generation to generation—in the first it was for the expenses of the khankah of Sheikh Kubeer Darvesh, in the second it was for the expenses of travellers.

The first Court held the grants to be endowments, or wuqf. On appeal the opinion of the law-officers of the Provincial Court was taken, and at a later stage of the case the matter was re-considered by one of these, and eventually by the Kazee-ool-Koozat. The law officers, Abbas Ali and Gholam Soobhan, concurrently returned a futwa in which they state as follows: "It is true that the apparent meaning of 'inam' is to bestow a grant, yet, although this apparently involves the creation of a proprietary right, it appears from the evident drift of the firman that Shah Kubeer Darvesh cannot be the grantee.

"The firman (the first) cannot, therefore, be held to create a proprietary right," &c.

Admitting that they came to this conclusion by a somewhat artificial construction, yet it is clear that they did not think themselves bound to stop short at the word "inam," and to refuse to consider the intention of the grantor.

The Judge, Mr. Smith, before whom the appeal was pending, did not accept the above conclusion, and, among other reasons, refers to the use of words creating a heredit right, stating that these are never used in deed of wuqf. The case went bef another Judge (Mr. Harington), the fi was returned for re-consideration to Ab Ali (Gholam Soobhan being absent), and t officer in his reply observed that to t word "inam," for the reasons before stated attached no force, and, as further proof *the nature of the grant did not dep on the word adopted to convey it,* he q ed certain authorities, and adhered to former opinion, that in the one firman t word "inam" expressed the creation of a w and in the other the same word expressed gift to the individual.

The Kazee-ool-Koozat declined to de mine the effect of the terms used in the firmans, and declared that reference shou be had to the custom of the country, a that the question should be decided by t sense attached by common usage to t expressions, and this opinion was adopted b Mr. Harington.

It thus appears that the three law-office concurrently held that a grant is to be co strued according to the intention of t grantor, and not according to the strict int pretation of the particular word of gift us by him; and if that rule of constructi which is as accordant to reason as it w held to be to Mahomedan Law, be adopted as there can be no doubt as to the intentio in the present case, it follows that this w not a gift to the individual. The absen of provision for succession by children significant, though I am not prepared to go so far as to say that the office of Sujjada Nisheen or Mutawalli is not heritable, and is never made so in express terms in a deed creating wuqf, as was said by Mr. Smith in the case cited.

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RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 2nd December 1875.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Escape from illegal confinement—High Court's powers.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Patna.

The Queen

versus

Rughoobur Singh and Mussamut Doolaroo.

The Legal Remembrancer for the Prosecution.

Where a party was sentenced to ten months' imprisonment for escaping from a confinement which he was undergoing without warrant of law, and without having committed an offence, the High Court, in the exercise of its powers of interference, set aside the sentence.

Reference.—THE facts of the case are, that one Rughoobur Singh was charged before the Cantonment Magistrate of Dinapore with the offence of escaping from lawful custody, and was convicted and sentenced to rigorous imprisonment for ten months under Section 224 of the Indian Penal Code on April 26th, 1875. On the same date, one Mussamut Doolaroo was convicted and sentenced to two months' rigorous imprisonment under Section 216 of the Indian Penal Code, for harbouring the accused Rughoobur Singh.

I am of opinion that the conviction of the above-named two accused persons is illegal, and ought to be set aside for the following reasons:—

The accused Rughoobur Singh was, at the time of his escape from custody, in confinement under a sentence of two months' imprisonment passed by the Cantonment Magistrate, on April 21st, 1875, under Section 224 of the Indian Penal Code. This sentence was reversed by this Court on appeal; and as the decision of the Appellate Court is final, it follows that the conviction of April 21st was illegal, and consequently the confinement of accused under that conviction was not "a custody in which he was lawfully detained" within the meaning of Section 224 of the Indian Penal Code.

I forward copy of the decision of this Court, dated June 14th, 1875, setting aside the conviction of accused, dated April 21st, 1875.

I have not thought it necessary to call for any explanation from the Cantonment Magistrate, for the Court will perceive that the sentence passed by him on April 26th was passed before the previous conviction of April 21st had been declared by this Court to be illegal.

If the sentence passed on Rughoobur Singh on April 26th is illegal, it follows that the sentence passed on Mussamut Doolaroo on the same date is also illegal.

This reference was not made at an earlier date, because the fact that the two accused persons had been sentenced on April 26th, under the particular circumstances stated, only came to my knowledge on the 2nd instant, and the record of the case was not received until to-day.

Judgment referred to by the Judge in his letter of reference.

The accused has been convicted and sentenced by the Cantonment Magistrate of Dinapore under Section 224 of the Indian Penal Code.

The "offence" with which accused is said to have been charged is that of having "transgressed by going into the regimental bazar, late at night, and concealing himself in the same woman's (*i.e.*, registered prostitute's) hut."

On this case coming up in appeal, I requested the Cantonment Magistrate to state under what provisions of the law the accused can be held to have committed an

"offence" in concealing himself in the prostitute's hut. The Magistrate has submitted his reply in his letters Nos. 13C and 22C of June 3rd and June 12th respectively. I am of opinion that the conviction in this case is illegal, because there is no proof that the rule referred to by the Cantonment Magistrate, to the effect that "male natives are prohibited from entering the houses of registered prostitutes," has ever been confirmed by Government as required by Section 18 of Act XXII. of 1864. It is admitted by the Cantonment Magistrate that, as a matter of fact, the rule has never been confirmed by Government; but he considers that the rules made by the Quarter-Master under orders of the Commanding Officer are legally binding on all persons to the extent of making the transgression of such rules an "offence," as defined in Section 40 of the Indian Penal Code, as amended by Section 2 of Act XXVII. of 1870.

But to support this contention, it must be shown that the act of entering a registered prostitute's house is an offence actually made punishable by law, or that the "public servant" (*i.e.*, the Quarter-Master) by whom such entry was forbidden was lawfully empowered to forbid such entry, and that the offender was aware of such prohibition (*see* Section 188 of the Penal Code). And even if the accused had been guilty under Section 188, it seems very doubtful whether he could be lawfully arrested without a warrant. Certainly he could not be so arrested out of military cantonment. Looking at Section 28 of Act XXII. of 1864, I think that the prosecution have failed to prove that accused had committed or was charged with an offence for which he could be "lawfully apprehended," and I therefore set aside the conviction of appellant, and direct that he be released.

Judgment of the High Court.

Jackson, J.—It does not appear to us to be necessary to consider whether the Judge is right in saying that, inasmuch as the sentence under which Rughoobur Singh had been originally confined was set aside by the Appellate Court, the proceeding and imprisonment of Rughoobur was for that reason *ab initio* illegal and void. All that we have to consider in the present case is whether the further order sentencing Rughoobur to ten months' imprisonment for escaping from custody under the previous warrant ought to be upheld. It is manifest that Rughoobur Singh was in the first instance arrested and confined absolutely without warrant of l He committed no offence, and that wh was imputed to him was no offence. had, notwithstanding that, undergone un the first and the second sentences a c siderable term of imprisonment. Reg being had to that, it appears to us that certainly cannot uphold the second and later conviction which deals with him a criminal on account of having escaped fr confinement under the first sentence pa upon him. The power which is given this Court is very wide in character in matter. We shall have to look both to legality and the propriety of the proceedi and taking the above view of the ma we think that the order of the Canton Magistrate sentencing Rughoobur on 26th April to ten months' imprison must be set aside.

The 14th December 1875.

Present:

The Hon'ble F. B. Kemp and F. A. Glo *Judges.*

Code of Criminal Procedure, Section 530—Ju diction—Police report.

(Miscellaneous Case.)

Puddomonee Dassee, *Petitioner,*

versus

Juggodumba Dassee, *Opposite Party.*

Mr. W. C. Banerjee and *Mr. R. T. All* for the Petitioner.

Mr. T. D. Ingram for the Opposite Par

Where a dispute between parties is not concern land or its boundaries, or concerning houses, w fisheries, or produce of land, but simply as to collections one of the parties has made, and what he is entitled to collect under a decree of C the case does not come under the provisions of Ac of 1872, Section 530, but under the ruling in 18 W Cr. Rul., pp. 35 and 36.

Where a case falls under Section 530, and the M trate proceeds on the basis of a police-report does not state that there was any collection of m the part of the opposite party, the proceeding is sufficient proceeding under that Section.

Kemp, J.—On the 25th of October rule was granted, calling upon the oppo party, Juggodumba Dassee, to show ca why the orders of the Magistrate of Dina pore, dated the 11th and 17th of Septem last, should not be set aside. Notice

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was issued on the Magistrate, and the record was called for.

The points for decision before us are, 1st, whether Section 530 of the Code of Criminal Procedure is applicable to the case, and, if so, whether the Magistrate has acted up to the provisions of that Section or not.

A brief history of this case appears to me necessary. Puddomonee Dassee and Juggodumba Dassee are sisters, daughters of the late Rashmonee Dassee. After considerable litigation, it was finally decided by this Court in its original jurisdiction that the plaintiffs in that case, that is to say, the petitioner before us, Puddomonee Dassee, and others, are the sebaits jointly with the defendants in that case, Juggodumba Dassee and others; that, as such, Puddomonee was entitled to all rights and privileges of such sebaits; it was further ordered and decreed that the defendants Juggodumba Dassee and others do admit Puddomonee and others to all their rights and privileges as sebaits, and do join with them as sebaits in the management of the trusts and the keeping-up of the performance of the worship of the gods and goddesses as agreed upon when the suit No. 47 of 1867 was settled. It was further declared that Puddomonee and others are entitled to have their names entered in the registers of the Collectors of Dinagepore and the 24-Pergunnahs as sebaits jointly with the defendants Juggodumba and others. The defendants were further ordered to do all necessary acts to enable the plaintiffs Puddomonee and others to have their names so registered as aforesaid. The suit was further adjourned, in order that an account might be taken as against Juggodumba and others, defendants, of the rents and profits and expenditure in respect of the zemindaries, lands, houses, and temples mentioned in the 13th para. of the instrument of gift executed by the late Rashmonee Dassee, dated the 18th February 1861. It appears from the evidence in this case that Puddomonee deputed some native amlah, ameens, and an establishment of peons and burkundazes for the purpose of ascertaining the amount collected by Juggodumba during the period over which she was in possession of the whole of the endowed estate; that the karpurdaz, on behalf of Juggodumba, appears to have made a statement to the police, to the effect that Puddomonee's amlah and burkundazes were seizing the ryots, were committing oppression in the mofussil, and had collected lattials in the house of one Khaer Mahomed for the purpose of forcibly taking possession of the estate connected with the endowed property.

Upon this, the Sub-Inspector of Police proceeded to the spot, and reported that there was no jumyutbust or collection of men as alleged. He then enters into a learned disquisition as to the effect of the decree of the High Court, and ends his report by saying that, although there are no symptoms of any collection of men or any imminent prospect or probability of a breach of the peace, still that, looking to the whole case and to his opinion as to the construction to be put upon the decree of the High Court, it was probable that, if Puddomonee was permitted to interfere with the ryots, a breach of the peace would take place.

Upon this report, and apparently upon this report alone, the Magistrate instituted proceedings under Section 530 of the Code. Under that Section, the Magistrate is bound to record a proceeding, stating the grounds for his being satisfied that a dispute likely to induce a breach of the peace exists concerning any land or the boundaries of any land, or concerning any houses, water, fisheries, crops, or other produce of land within the limits of his jurisdiction. Now, the only ground stated in the Magistrate's proceeding for bringing this case under the provisions of Section 530 is the report of the police. Now, as already shown, the report of the police distinctly stated that there was no collection of armed men on the part of Puddomonee as alleged by the party who lodged information at the police station. The dispute, if any, was with reference to whether Puddomonee, under the decree of this Court, which was affirmed in appeal, is entitled to make enquiries in the mofussil through her karpurdazes, in the shape of ameens with their necessary establishment, into the amount of collections received from the ryots by Juggodumba during the period over which she was in sole possession, to the exclusion of the rights of Puddomonee. There was no dispute between the parties as to land; the dispute had been finally adjudicated upon by the highest Court in the country, and that Court had decided, as already recited above, that Puddomonee was entitled as sebait to joint possession with Juggodumba and others of this endowed property; and further, in that decree, Juggodumba was enjoined to give every assistance to Puddomonee in obtaining possession jointly with her, and in collecting

the rents jointly with her. From the commencement of the dispute, Puddomonee, through her mofussil agents, distinctly repudiated any intention on her part of taking forcible possession, as alleged by the kurpurdaz of Juggodumba and others, and stated that her object was simply to carry out the orders and instructions of this Court, and that the deputation of ameens and necessary establishments was nothing more than carrying out the instructions of this Court to satisfy herself as to the amount which Juggodumba had collected from the ryots. The evidence which has been adduced in this case, and more particularly the evidence of Mohima Chunder Chuckerbutty, who is admittedly the naib and tehsildar on behalf of Juggodumba, clearly shows that he had got no order from his mistress to admit or to exclude Puddomonee from collecting the rents; and he also does not depose to any act on her part or on the part of her dependants tending to induce a breach of the peace. The ryots who have been examined state generally that they were told not to pay till all the shareholders were together, and they none of them depose to any acts on the part of Puddomonee or of her dependants which were likely to induce a breach of the peace. Therefore, I am clearly of opinion in this case that the dispute between the parties, not being a dispute concerning any land, or the boundaries of any land, or concerning any houses, water, fisheries, crops, or other produce of land, but being simply a dispute as to what collections Juggodumba had made, and as to whether she was entitled to collect the whole or 16 annas of the rents from the ryots, or to do so jointly with Puddomonee under the decree of the High Court, the case does not come under the provisions of Section 530, but under the ruling to be found in Vol. XVIII., Weekly Reporter, Criminal Rulings, pp. 35 and 36. Then further I am of opinion that, if the case had come under the provisions of Section 530, the proceeding of the Magistrate, stating the grounds for his being so satisfied, namely, that a dispute existed likely to induce a breach of the peace, is not a sufficient proceeding under that Section. He states in that proceeding that the report of the police is the basis on which he acts, and I have already shown that that report does not in any way state that there was any collection of men on the part of Puddomonee. I am further of opinion that the later order of the Magistrate, dated the 17th of September, prohibiting the amlah of Puddomonee to remain on the spot to enable them to ascertain what collections had been made by Juggodumba from ryots, was a wholly improper order.

The proceedings of the Magistrate are therefore quashed, and the papers are returned to him. He is at liberty, if he should think it necessary for the purpose of keeping the peace, to proceed under the Sections of the Code which authorize him to bind over the parties who, on evidence taken before him, are, in his opinion, by their acts and conduct in the mofussil, likely to induce a breach of the peace.

Glover, J.—I concur in this order.

The 16th December 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Code of Criminal Procedure, Sections 521 to 52[illegible] —Jurymen—Legal majority.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Backergunge.

Petamber Jugi, *Petitioner,*

versus

Nasaruddy, *Opposite Party.*

The law requires a Juryman to exercise his own understanding on the case submitted to him, and to decide on evidence, and not to follow blindly the opinion of his fellows. Where one out of three (in a Jury of five) depends on the inspection and inquiries of the other two, the verdict of the three is not that of a legal majority.

The provisions of Act X. of 1872, Sections 521 to 52[illegible] are only applicable when there is no doubt that the place where the alleged obstruction exists is a public thoroughfare.

Reference.—NASARUDDY, the opposite party petitioned for the removal of a house erected

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by Petamber, alleging that it was an obstruction to a public pathway. The case was made over to Deputy Magistrate Moulvie Mofizuddin, who appointed a Jury, and on the 30th August 1875 ordered the removal of the house within fifteen days.

I think that the Deputy Magistrate's order is illegal on the following grounds: In the first place, the Jurors have not acted together, and in a case like this, it is desirable that the Jurors should do so. In the next place, two out of the five Jurors appointed did not go to the place at all. One of the Jurors plainly says that he bases his report on what he gathered from verbal inquiry from another Juror. Lastly, there is nothing whatever to show that the obstruction is in a public place or thoroughfare to give a Magistrate jurisdiction under Section 521, Criminal Procedure Code. All that the Jurors, *i. e.*, those who did take the trouble to go to the spot, find is that the house, by being put where it is, is an obstruction to the complainants Amiruddy and Nasaruddy. If so, these parties have their remedies in the Civil Court. The obstruction in this case is a purely personal, and not a public, one, in which the Deputy Magistrate would have done better to recommend the parties to apply to the Civil Court. I recommend, therefore, that the Deputy Magistrate's order may be set aside.

I have not thought it necessary to call for an explanation from the Deputy Magistrate, as his judgment and the record of the case show clearly the grounds upon which the Deputy Magistrate arrived at his conclusion when he ordered the petitioner to remove the hut.

Judgment of the High Court.

Glover, J.—Under the circumstances, we think that the Deputy Magistrate's order must be quashed.

In the first place, there is no clear finding of the majority of the Jury that the road, wherein the obstruction has been made, is a public thoroughfare, and the two Jurors who formed the minority found that it was not such a thoroughfare.

And, secondly, the so-called majority was not, I consider, a legal majority. Two of the Jury went and saw the place, and made inquiries. The third never went near it, but formed his opinion solely on what had been told him by the other two.

I presume that the law requires a Juryman to exercise his own understanding on the case submitted to him, and to decide on evidence. Here the third Juryman did neither; he followed blindly the opinion of two of his fellows, without exercising any discretion of his own.

Putting the report of the majority of the Jury at its highest, the question whether the place was a public thoroughfare or not is left doubtful in the extreme, and it is only in cases where there is no doubt that the provisions of Sections 521—523, Code of Criminal Procedure, ought to be applied.

The 21st December 1875.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Code of Criminal Procedure, Section 221—Summary procedure—False evidence in a judicial proceeding.

The Queen

versus

Ramaotar Panre, *Appellant.*

Committed by the Joint Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of giving false evidence in a stage of a judicial proceeding.

Mr. R. T. Allan for the Appellant.

A charge of mischief, even if combined with one of theft, is triable summarily under Act X. of 1872, Section 221.

No special sanction is needed for the prosecution of a person for giving false evidence in a judicial proceeding.

Glover, J.—It is contended by Mr. Allan on behalf of the appellant:

(1) That the detailed judgment promised by the Joint Magistrate when he dismissed Sona's complaint has never been recorded, and that, therefore, the appellant does not know the grounds of the Joint Magistrate's disbelief of the witnesses.

(2) That the charge brought by Sona was not one which the Magistrate could try summarily under Section 222, Criminal Procedure Code, and that, therefore, his proceedings against the appellant for perjury were illegal.

(3) That the statement of the appellant was illegally and improperly taken, and was not, in fact, made at any stage of a judicial proceeding.

That the Joint Magistrate did not exercise his discretion wisely in getting up this case is admitted by the Sessions Judge, and is, I think, incontrovertible. To force a man into the witness-box, and then examine him on points wherein he must either criminate himself or commit perjury, was certainly not the right thing to do; but that is not the question we are now trying. The Joint Magistrate's proceedings may have been unwise and even unfair, but whether the appellant did or did not give false evidence is a matter apart, and one to be proved by evidence *aliunde*.

And that evidence seems as strong as possible against the appellant.

The absence of the Joint Magistrate's detailed judgment could not possibly affect the case against the appellant, which depended, not on the truth or falsehood of Sona's complaint, but on the fact whether the appellant was in a certain place in Sona's company or not at a certain time.

The charge brought by Mussamut Sona of mischief was one triable summarily under Section 221. As usual, the first charge combined with the offence of mischief the carrying off of property by an assembly of people, but on investigation the charge resolved itself into one of pulling down the complainant's premises, and going off with the materials. Even if the latter offence were theft, it would exactly come under the Section.

And the case was still pending, and was, to all intents and purposes, a judicial proceeding when the appellant gave the evidence which has now been held to be false. There was no need of any special sanction for the prosecution.

It appears to me that all the grounds of appeal fail; but, considering the circumstances under which the commitment was made, I think that the sentence passed by the Sessions Judge is even now too heavy. I would reduce it to one of six months' rigorous imprisonment.

Milter, J.—I concur.

The 4th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Code of Criminal Procedure, Sections 228 & 297—Manner of recording evidence—Contingent offences—High Court's powers.

(Miscellaneous Case.)

Kristodhone Dutt, Executor to the Estate of Shib Kisto Daw of Jorasanko, Calcutta, *Petitioner,*

versus

The Chairman of the Municipal Commissioners of the Suburbs of Calcutta, *Opposite Party.*

Mr. M. Ghose and *Baboo Gonesh Chunder Chunder* for the Petitioner.

Baboo Juggodanund Mookerjee for the Opposite Party.

Under Act X. of 1870, Section 228, Magistrates are not bound to record the substance of every separate deposition, but to state generally what is the substance of the witnesses' evidence.

In accordance with previous rulings, to the effect that a conviction, which is, in fact, an adjudication in respect of an offence which has not been committed, is bad, it was held that the imposition of a daily fine in case the accused should not remove an obstruction, in addition to a substantive fine for making the obstruction, was illegal.

The High Court has power, under Section 297, Criminal Procedure Code, to interfere in such a case as the above, and to annul what is illegal whilst passing a legal sentence.

Glover, J.—In this case a rule was obtained by the petitioner Kristodhone Dutt on the Chairman of the Suburban Municipal Commissioners to show cause why an order made by a Bench of Honorary Magistrates acting as Municipal Commissioners should not be set aside, on the ground (1) that the imposition of a daily fine in case the petitioner should not remove a certain encroachment or obstruction within ten days was illegal, it being in addition to a substantive fine of Rs. 50 for making the encroachment or obstruction; and (2) that the Bench of Magistrates in question had no power to try the case summarily, and that their order was consequently illegal.

The second point ought to have come first in order, and we shall dispose of the matter in this order.

By the notification of the Local Government, dated 6th May 1873, para. 4, any two Honorary Magistrates may, subject to

the orders of the Magistrate of the District, sit together for the trial of municipal cases, and for that purpose are vested with the powers of Magistrates of the third class and powers of summary trial under Section 225 of the Criminal Procedure Code. In the record of this case we find that Baboos Prankishen Mookerjee and Greesh Chunder sat together, and these gentlemen are, by the notification above alluded to, mentioned by name as appointed for the 24-Pergunnahs District with powers of Magistrates of the third class. They were, therefore, empowered to try municipal cases summarily under Section 225. It was argued by Mr. Ghose for the petitioner that, inasmuch as the name of an officer holding first-class powers is entered as being present during the trial, by Section 51, Criminal Procedure Code, all the Magistrates composing the Bench were vested *pro hâc vice* with first-class powers, and had, therefore, no jurisdiction to try the present case summarily, such jurisdiction having been restricted to Honorary Magistrates holding third-class powers only.

I do not think that this contention would hold good under any circumstance, because Section 51 expressly refers to cases where there has been no special direction as to the powers conferred, whereas, in this case, there has been the special direction mentioned in para. 4 of the notification that the Bench of Magistrates trying offences against the Municipal Acts are to have third-class powers only. But, as a matter of fact, I do not find that the first-class Magistrate took any part in the decision. If he had done so, he would have, by Section 229, been bound to have written the judgment himself as presiding officer, whereas it is admitted that the judgment passed by the Bench is not in his handwriting, but in that of the Third-class Magistrate Greesh Chunder Ghose; and, moreover, we must take it that only the Magistrates who signed the judgment are the officers who made it. How the First-class Magistrate's name came to be written in the book as "present" does not appear; but it is quite clear that he took no part in the order passed.

Strictly speaking, we might stop here, and discharge the rule so far; but as some argument was allowed as to whether the judgment of the Bench of Magistrates sufficiently complied with the requirements of Section 228, I may as well give my opinion on this point, although, as a matter of fact, it is not covered by the rule as granted.

The objection is to the way in which the "substance of the evidence" has been recorded, and it is contended that merely to state generally that the witnesses for the prosecution say so and so is not a sufficient record of the substance of their depositions. It seems to me that the law has been sufficiently complied with. The Magistrates, as I understand the Section, are not bound to record the substance of every separate deposition, but to state generally what is the substance of the witnesses' evidence, and this has been done here. And it must not be forgotten that this was a case which might have been carried in appeal to the Magistrate of the District on the merits, and this was the proper Court to decide whether or not the substance of the evidence was sufficiently well and clearly recorded to enable him to come to a proper decision. Instead of going to the Magistrate on the facts, the petitioner has chosen to come to this Court on the law point only; and unless it were quite clear that the provisions of the Section had been disregarded, I do not think that we should be bound to interfere. My opinion, moreover, is that the substance of the evidence has been sufficiently recorded.

The objection raised in the first ground of appeal has been more than once decided by this Court. A conviction, which is, in fact, an adjudication in respect of an offence which has not been committed, has been held to be bad in the following cases: 18 Weekly Reporter, p. 44; 20 Weekly Reporter, p. 64, and 21 Weekly Reporter, p. 31; and in accordance with these Rulings, I hold that the imposition of a daily fine of Rs. 2 in addition to the substantive fine of Rs. 50 was illegal, and should be quashed.

But it has been argued that, on the authority of Queen *v.* The Justices of the Peace, *In re* Sagur Dutt, 1 Ben., O. C., p. 41,* a conviction cannot be partly good and partly bad, and that, if it be partly bad, it must be set aside altogether. This case was one in connection with the Calcutta Police Act, and was disposed of in accordance with the special requirements of English law. A contrary view has been held in the case of W. N. Love, XVIII., p. 44, and also in the case in the 20th Volume above referred to. Moreover, Section 297, Criminal Procedure Code, 6th para., seems expressly to give this Court power to interfere in a case like the present, and to annul what is illegal whilst passing a legal sentence.

Except as regards the imposition of the daily fine, I think that this rule must be discharged; and as the Honorary Magistrates

* Also reported as a foot-note in 18 W. R., Cr., 44.

ought to have known that the imposition of a daily fine was wrong, the decision of this Court on the subject having been passed so far back as 1872, I would make no order as to costs.

Mitter, J.—I am also of the same opinion.

The 4th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Detention of accused—Remands.

(Miscellaneous Case.)

Zuhuruddeen Hossein, *Petitioner.*

Moonshee Mahomed Yusoof for the Petitioner.

A Magistrate is not at liberty to retain an accused person in custody, except upon a proper remand made after taking sufficient evidence given on oath or solemn affirmation.

Glover, J.—THERE can be no doubt, I think, that the proceedings of the Deputy Magistrate have been illegal. The accused, Zuhuruddeen, for whose apprehenison a warrant had been issued, himself came in and surrendered. In the words of Section 190, Criminal Procedure Code, he "appeared before the Magistrate," and the Magistrate was bound, in accordance with the Section, to take "the evidence of the complainant and of such persons as are stated to have any knowledge of the facts which form the subject-matter of the accusation," &c. Until he did this, the Magistrate was not empowered to remand the accused.

Now, the Deputy Magistrate, by whom the enquiry is being made, has not done this. The record has been sent to us, and we find that no evidence of any kind has been recorded. Several persons have made statements no doubt, but these statements are not upon oath or solemn affirmation, and were, therefore, not evidence on which the Deputy Magistrate could remand the accused. As a matter of fact, Zuhuruddeen has been kept for the best part of a month on two remands without a tittle of evidence having been recorded against him.

In a somewhat similar case (Queen *v* Muthooranath Chuckerbutty, 17 W. R., p. 55), a Division Bench of this Court held that a Magistrate was not justified in postponing a case, where no evidence had been taken, which could have been made the foundation of a charge, merely because he was in expectation that, after some time and by dint of enquiry, some evidence might be obtained, and this appears to me a correct view of the law.

If the Deputy Magistrate wishes to retain the accused in custody, it must be on a proper remand made after taking evidence sufficient to justify it. In the present case he took no evidence, and was not, therefore, justified in keeping the accused in custody.

Mitter, J.—I concur.

The 4th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Depositions of prisoners—Evidence Act, Section 30.

The Queen

versus

Keshub Bhoonia and others, *Appellants.*

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of committing murder.

Statements made by a prisoner before the committing officer, which implicate his fellows and exculpate himself, cannot be regarded as evidence under the Evidence Act, Section 30.

Mitter, J.—I DO not think that in this case the offence with which the prisoners have been charged has been established by satisfactory evidence against them.

Excepting Sundar Jana, the rest of the appellants have been found by the Sessions Judge guilty of murder under Section 302, and this finding mainly rests upon the testimony of three persons, *viz.*, (1) Hot Manick, (2) Bishoo Dass, and (3) Bindabu Jana, supported by certain circumstances attempted to be proved by other evidence for the prosecution. There are also on the record statements made by some of the prisoners before the committing officer generally agreeing more or less with the depositions of the eye-witnesses; but one peculiar feature is common to all of them that the person making the statement, while implicating some of his fellow-prisoners carefully exculpates himself. Such statements cannot, I think, be considered as evidence under Section 30 of the Evidence Act. The Sessions Judge has also taken

the same view of the Section in question, yet, inconsistently enough, makes use of them against all the prisoners, because he thinks that the evidence of Bishoo Dass, the only eyewitness whom he believes, ought to be accepted, inasmuch as it is entirely corroborated by these statements. Each of these statements, so far as it goes, is, no doubt, evidence against the person making it, and their value, as such, I shall consider hereafter.

In considering the evidence in this case, it is very important to bear in mind the circumstance that the village where the murder is alleged to have been committed is divided into two factions. It is also important to bear in mind the fact that, if we exclude the eyewitnesses, there is no evidence on the record to prove that the deceased came to his death by foul means. No facts were established by the medical evidence to lead to this inference; and the persons who saw the corpse of the deceased before it was sent in for medical examination do not depose to having found any external marks of violence on the body which could reasonably lead to that supposition. These circumstances, taken together, are important, because in a village divided by faction, such charges, when falsely trumped up, are easily supportable by false evidence.

The story told by these witnesses, who were all present when Sham Dass was murdered, is so highly improbable that it cannot be believed that men in sober sense could have acted in the way the prisoners are alleged to have acted. The place where the murder is alleged to have been committed is within 30 yards from the prisoner Kartick's house, which is surrounded by houses of many persons, and the time of the occurrence was just after dark. It is proved in evidence that there used to be music every evening in Kartick's house, which attracted a pretty large number of villagers to that place at that time. Yet we are to believe that the prisoners who conspired to murder Sham Dass, and the prisoner Hurry Dass, in pursuance of that plot, called him away from his house, and brought him to Kartick's house, selected that place for carrying out their murderous plot. The rashness of the conspirators does not stop here, because, according to the evidence, we find Kartick sent for his Poorohit, Bishoo Dass, to come to his house that evening, and ordered his servant, Bindabun Jana, to stay there at that time, although it was not usual for him to remain there at that time. These are precisely the reasons given by these witnesses to account for their presence in the house of Kartick at the time of the murder. Of these witnesses, the Sessions Judge is of opinion that Bishoo Dass is thoroughly reliable, and he being Poorohit of some of the prisoners, his testimony against his jujmans is entitled to credit. The prisoners deny the fact that he is their Poorohit. There is one fact admitted by Bishoo Dass which lends considerable support to this denial. Bishoo admits that his ordinary occupation is that of a cook, and he is employed as such by a Baboo at Calcutta. It is a well-known fact that a Brahmin, acting as a Poorohit and having jujmans, would scarcely condescend to serve as a cook. On the whole, the story told by these witnesses is so strange and improbable that I have not the slightest hesitation in coming to the conclusion that, whether the prisoners be guilty or not, they have not deposed to facts which occurred in their presence. I would, therefore, reject their evidence as utterly worthless.

Whatever suspicious circumstances may have been established by other evidence against some of the prisoners, if we throw aside the direct testimony, they are not sufficient for convicting the prisoners as persons guilty of murder. If we take the statements made by the prisoners before the Deputy Magistrate as evidence only against the person making them, then they do not amount to confession of guilt of murder. Possibly some of them may amount to other minor offences connected with the offence of murder. But we find these statements are inconsistent with one another, and therefore there cannot be any doubt that all of them cannot be true. Therefore, I do not think that it would be just to convict any one of the prisoners of any offence upon his statement alone before the Deputy Magistrate, which statement was withdrawn before the Sessions Judge, and was alleged to have been falsely made, they having been induced to make them by false hopes and promises having been held out to them.

I would, therefore, acquit the prisoners, and order their release.

Glover, J.—I concur generally in the remarks of Mr. Justice Mitter. At the best, the case against the accused is very dubious, and we should not be justified in upholding the conviction. I agree in the order proposed by my colleague.

The 6th January 1876.

Present:

The Hon'ble F. B. Kemp and C. Pontifex, *Judges.*

Dismissal of complaint—Prosecution under Act XLV. of 1860, Section 211.

(Miscellaneous Case.)

Syed Nissar Hossein, *Petitioner.*

versus

Ramgolam Sing, *Opposite Party.*

Moonshee Mahomed Yusoof for the Petitioner.

Where a charge, made against a peshkar and the police, was dismissed upon the statements of the persons examined by the police, and without complainant's witnesses being examined, the order of dismissal was held to be illegal.

It was also held to be illegal for the Magistrate to sanction a prosecution under the Indian Penal Code, Section 211, against the complainant, without giving him an opportunity to prove his charge.

Kemp, J.—THIS petition was originally presented to a Division Bench (Present: Justices Glover and Mitter). Those learned Judges thought proper to send for the record of the case. The record has come up, and has been laid before the Court. After reading the proceedings of the Assistant Magistrate and Magistrate of Patna, we are clearly of opinion that the Assistant Magistrate ought not to have dismissed the petitioner's charge against Ramgolam, the peshkar, and the police, without examining the witnesses adduced by the petitioner. On the 2nd of December 1875, the petitioner was examined by the Assistant Magistrate, and, at the end of his deposition, he says: "My witnesses to this case are contained in this list A now filed by my vakeel." These witnesses were not examined. The Deputy Magistrate appears to have dismissed the petitioner's case as against Ramgolam and the police, after causing a local enquiry to be made by the police; and the Assistant Magistrate, considering the statements of the persons who were examined by the police to be evidence in the case, which they are not, proceeded to dismiss the petitioner's case, without examining the petitioner's witnesses mentioned in the Issumnuveesee marked A. We think it was also clearly illegal on the part of the Assistant Magistrate and Magistrate to give sanction under Section 211 of the Indian Penal Code, without giving the petitioner an opportunity of adducing evidence to prove that the charge which he made was a true one.

We, therefore, quash the orders of the Assistant Magistrate and Magistrate, directing that proceedings be instituted against the petitioner under Section 211 of the Penal Code.

The 6th January 1876.

Present:

The Hon'ble A. G. Macpherson, F. A. Glover and Romesh Chunder Mitter, *Judges.*

Receipt of stolen property—Presumption—High Court's revisional jurisdiction.

(Miscellaneous Case.)

Ramjoy Kurmokar, *Petitioner.*

Baboo Greeja Sunker Mozoomdar for the Petitioner.

Where stolen property is found with a person who admits having received it, it may be fairly presumed that the receipt was a dishonest one, unless the receiver's conduct is satisfactorily explained.

Sitting as a Court of Revision, the High Court cannot enter into any question as to whether, on the evidence before it, the Lower Courts have come to a right conclusion as to the facts; but if there is absolutely no evidence, the conviction may be set aside as based on a material error in law.

Glover, J.—I DO not think that we should be justified in interfering with the order of the two Courts below in this case.

That the pair of shawls formed part of the stolen property is fully proved; the receipt of them by the accused is admitted; his defence is that he took them in good faith as a pledge, advancing on them the sum of Rs. 10.

Now, the fact of the shawls being stolen property being proved, and their receipt admitted, it was a fair inference that the receipt was a dishonest one, unless the accused's conduct in the matter was satisfactorily explained.

The substantial ground of this appeal is that his conduct has been so explained; that he did not purchase the shawls, but only advanced Rs. 10 on them as a pawn; and

that his nephew immediately produced them, when asked to do so by the Inspector of Police.

Now, it seems to me that the mere fact of the money paid being called an advance on pawn, and the fact of the shawls being immediately given up, are not sufficient to explain the undoubtedly suspicious conduct of the accused throughout the transaction.

It is not denied that Prosonno Koomar Shaha, the person from whom the shawls were obtained, is a man in poor circumstances; indeed, it is admitted that the accused knew that the shawls were not his, for he (the accused) asked who were the *bhuddro loke* who had entrusted them to Prosonno Koomar to pawn. When, therefore, valuable property declared to be worth Rs. 125 is offered in pledge—supposing for the nonce that pledge is the right word to use—for Rs. 10, and the would-be pledger, notwithstanding enquiry, professes to be ignorant of the names of the respectable persons who have given him the property to pawn, would not any honest pawnbroker's suspicions have been aroused? It seems impossible to believe that, after the man Prosonno Koomar's refusal to answer the question as to the ownership of the shawls, Ramjoy Kurmokar continued to think and to believe that the property had been honestly come by. Then, as to the fact of the things having been pawned, no doubt, the word is used, and considerable stress was laid on the fact that the accused had a memorandum of the transaction. I can find no such memorandum on the record, nor does the accused say that he kept such a memorandum in his petition of appeal, nor is there any mention of it in the Deputy Magistrate's judgment. That the property was at once given up is, no doubt, true, and the accused is entitled to all the benefit of the act of his nephew; but as the Deputy Magistrate pertinently observes, the nephew was a youth, the Police Inspector was before him, and he knew that, if he hesitated, a search, which would have resulted in the finding of the shawls and the consequent discomfiture of the shopkeeper, would have been promptly carried out.

On the whole, I do not think that the accused has satisfactorily explained himself or established the good faith of his transaction with Prosonno Koomar; and being of that opinion, I must hold that the order of the Courts below was not an improper one.

Mitter, J.—It appears to me that the decision of the Deputy Magistrate in this case is erroneous in law on several points, and cannot, therefore, stand.

The accused has been found guilty under Section 411 of the Indian Penal Code, and the circumstances connected with his conviction are briefly these: While the police was engaged in enquiring into a theft-case, one Prosonno Koomar Shaha, who was in custody of the police as a person suspected to have been implicated in the theft, confessed to having pledged with the applicant before us a pair of shawls for Rs. 10. The police-officer conducting the enquiry thereupon went to the house of the applicant, who was absent from home at that time. His nephew, having been questioned, at once produced the pair of shawls in question, and also a *chick* which he, the nephew, alleged that Prosonno Koomar had pledged with his uncle in the previous Assar for Rs. 34. The police thereupon sent the applicant, who, when he came home, confirmed the statements of his nephew, as a witness in the case which was commenced against Prosonno Koomar and several other persons upon a charge of theft. The Deputy Magistrate who was trying that case thought otherwise, and ordered that he should be prosecuted on the charge of dishonestly receiving or retaining stolen property under Section 411 of the Indian Penal Code, and ultimately has convicted him of that offence. An appeal was preferred against that order to the Sessions Judge, who has rejected it under Section 278, Criminal Procedure Code. The accused has now made this application to this Court, on the ground that the reasons given by the Deputy Magistrate in finding him guilty are erroneous in law, and that this Court, under its powers of revision, should set aside the conviction as unjust and erroneous.

Now, that the pair of shawls found in the house of the prisoner shortly after they were stolen formed part of the property stolen is abundantly proved, and, under these circumstances, unless the accused satisfactorily accounted for his possession of them, it would not be erroneous to presume that he was either the thief or the receiver of stolen property, punishable under Section 411 of the Indian Penal Code (*vide* Section 114, Illustration *a*, of the Evidence Act). The defence of the accused was that they were pawned with him by Prosonno Koomar, and in this point he was supported by the statement of the latter. Before the Deputy Magistrate could convict the prisoner under Section 411 of the Indian Penal Code, I

think the Deputy Magistrate, under the circumstances of the case, was bound to come to a clear finding upon this question, namely, whether they were pledged with the accused or not as stated by him. I do not think that the Deputy Magistrate has done so. This is the main error which runs throughout his decision. Then there are several facts assumed by him against the accused without any evidence; these are the two main grounds upon which, I think, his decision is erroneous in law, and I shall now notice his reasons in detail in order to show how his judgment has been affected by these two material errors.

After stating the facts of the case, and giving a short history of the prosecution against the accused, the Deputy Magistrate observes:—

"It is shown in evidence, and admitted by the prisoner Ramjoy Kurmokar, that Prosonno Koomar Shaha is a man of straw, a common day-labourer, his occupation being that of a *koil*, or measurer of articles of merchandize, &c." Now, so far as the evidence or the admission of the accused goes, it is clear that Prosonno Koomar was by profession a *koil;* but beyond that there is nothing, either in the evidence taken in the presence of the accused or in his admission, which goes to show whether Prosonno Koomar is a man of straw or not. In the next sentence it appears that the Deputy Magistrate thinks that the accused received the pair of shawls for Rs. 10 from Prosonno Koomar. But he does not say here whether the Rs. 10 were advanced as a loan upon the pledge of the pair of shawls or not. Then he comments upon the fact that, when the pair of shawls were pledged, Prosonno Koomar said he did not know the name of the *bhuddro loke* to whom they belonged, and with reference to this circumstance he says: "I need hardly observe that the above alone would have aroused the suspicion of an honest man, and he would have then and there handed over Prosonno to the authorities." Further on he observes: "If Ramjoy were an honest man, it certainly would have struck him that, had Prosonno Koomar honestly come by the shawl, he most assuredly should have known the man who gave it to him, and Prosonno Koomar could have very easily got Rs. 10 on it from any shop-keeper, money-lender, or any other man at Goalundo Bazar. Now, it is a well known fact in this country that the class of persons called *bhuddro loke* are generally reluctant to publish their staitened circumstances by personally negotiating for a loan on the pledge of articles belonging to them. Having regard to this fact, whether the prisoner should have, as a prudent man, refused to keep the offered pledge or not, certainly it cannot be said that he received them knowing, or having reason to believe that they were stolen property, merely because Prosonno Koomar said that he did not know who the owner was; and as to the observation that Prosonno Koomar could have got Rs. 10 from any money-lender or shop at Goalundo, it is simply an assumption based upon no evidence. The Deputy Magistrate concludes this paragraph of his judgment by observing that he feels no hesitation in stating "that Ramjoy received the pair of shawls with the full understanding that it had been stolen property." I have already remarked that the circumstance adverted to by him does not legally lead to the conclusion at which he has arrived. To convict the prisoner upon a circumstantial evidence like this would be conviction upon no evidence.

In the next paragraph the Deputy Magistrate especially deals with the defence of the prisoner, and, after referring to the transaction of a pledge of a *chick* between Prosonno Koomar and the accused in the last Assar, says: "This shows that Ramjoy has had dealings with Prosonno, and knows this man too well to make any distinction between the words sale and pawn, which to thieves and to receivers of their stolen property are, I should think, synonymous terms." Now, the whole of this argument is without the slightest foundation upon any evidence on the record. Beyond the fact that, in Assar last, a *chick* was pledged by Prosonno with Ramjoy for Rs. 34, and the same had not been redeemed up to Srabun the following month, nothing further is known from the evidence in this case about that transaction. It may be that it was a fair transaction, or it may be that that *chick* was not a stolen property. We know nothing about these facts, and yet the Deputy Magistrate seems here to suggest from that transaction that the apparent pledge of the pair of shawls for Rs. 10 was a mere cloak for the sale of a valuable article for a mere trifle, *viz.*, Rs. 10. But, before a judicial officer comes to this conclusion, he should have some reasonable grounds upon which he can safely base his opinion. Then the Deputy Magistrate thus continues his arguments upon this part of the case: Be that as it may, Ramjoy seems to know very well that Prosonno Koomar would never

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again come for the shawls, or that, if he would, no body would believe him, as he is a man of straw, and he himself (Prosonno) would not dare publicly avow how he had come by it." The whole of this consists of a series of assumptions of guilty intention on the part of the accused without a particle of evidence in support of them. "I may also observe," he continues, "that the circumstance that Ramjoy dealt with Prosonno, a common day-labourer, in valuable things for nominal consideration at short intervals of time, also shows, beyond a doubt, the dishonesty of his own character." Here also the Deputy Magistrate has assumed the dishonest character of the first transaction of Assar against the accused without any evidence.

I have now noticed at some length almost all the reasons given by the Deputy Magistrate for his opinion, and I think I have shown that they are mainly based upon certain facts assumed by that officer, and not proved in the case. For this reason, and also for the reason that he has not distinctly come to a conclusion one way or the other upon the question, whether the pair of shawls were really pledged for Rs. 10 with the accused or not, I am of opinion that we should interfere with the decision of that officer, as there are material errors of law in it which have affected the justice of the case. I would, therefore, quash the conviction, and order the release of the accused.

Macpherson, J.—The point to be decided seems to be—Is there on the record any evidence that Ramjoy Kurmokar (the petitioner) received the stolen shawl from Prosonno Koomar Shaha with a guilty knowledge? If there is any legal evidence of guilty knowledge, this Court ought not to interfere. For the case is not before us in appeal, but has been called for under Section 297 of the Code of Criminal Procedure. And as we have to deal with it in the exercise of the High Court's power of revision, it is only in the case of material error in law or procedure that the decision of the Lower Courts ought to be disturbed. Agreeing with the decision in the case of Debi Churn Biswas (20 W. R., Cr., p. 40), I think that, sitting as a Court of Revision, we cannot enter into any question as to whether, on the evidence before it (so far as there was any evidence legally before it), the Lower Courts have come to a right conclusion as to the facts. But, of course, if there be absolutely no evidence of guilty knowledge, then the conviction is based on a material error in law, and may be set aside.

The petitioner, Ramjoy Kurmokar, has been convicted, under Section 411 of the Penal Code, of receiving a shawl knowing it to have been stolen.

There is evidence of the following facts; and, except so far as appears from these facts, there is no evidence whatever of guilty knowledge on the part of Ramjoy.

There is evidence—

I.—That the shawl was stolen, and Prosonno Koomar was concerned in the theft, or in disposing (with guilty knowledge) of the stolen property;

II.—That the shawl was worth about Rs. 125, and, immediately after the theft, Ramjoy received it as a pledge from Prosonno Koomar, to whom he lent Rs. 10 on the security of the shawl;

III.—That Prosonno Koomar was a common working man employed as a weighman at Goalundo, and that he was not a man of special substance or means;

IV.—That, when Prosonno Koomar brought the shawl, and proposed to raise money by pledging it, Ramjoy enquired where he got it, to which Prosonno Koomar replied that a respectable person had given it to him to pledge, but that he did not know the name of the respectable person;

V.—That Ramjoy had, on a previous occasion (about a month before the pledge of the shawl), lent Rs. 34 to Prosonno Koomar on pledge of a gold *chick* weighing about sicca 2-15 annas;

VI.—That, when the Police Inspector went to Ramjoy's house to enquire as to the shawl, Ramjoy was absent, but his nephew was present, and produced the shawl at once (making no difficulty about it), when asked to produce it.

It seems to me to be impossible to say that there is not, under heads III. and IV., *some* evidence of guilty knowledge. There certainly was evidence which a Judge trying the case with a Jury would have had to place before the Jury. No doubt, the evidence is not very strong or conclusive. Still, as it is evidence, and as both the Lower Courts are satisfied with it, the case is not one in which, in my opinion, the Court ought to interfere under Section 297. There is nothing materially wrong in law or in procedure in the conviction, or in the sentence which has been passed on the petitioner.

In saying this, I am not to be supposed to express my concurrence in all that the

Deputy Magistrate has said with regard to the evidence as to Ramjoy.

I think we should not disturb the conviction.

The 21st January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Prosecution for perjury.

(Miscellaneous Case.)

Keerut Singh, *Petitioner,*

versus

Narain Passee, *Opposite Party.*

Mr. C. Gregory for the Petitioner.

Where the High Court sanctions a prosecution for perjury, it is implied that the proper legal procedure will be adopted, and the proceedings instituted in a Court having jurisdiction to entertain the charge.

Glover, J.—THE intention of our order was undoubtedly that a commitment (if there were sufficient evidence to go upon) should be made to a Court of Session, and not that any officer who might be invested with first-class powers should take up and dispose of the case on trial. The Assistant Magistrate's proceedings were, therefore, opposed to our order.

But, putting this aside, our order sanctioning a prosecution, of course, supposed a proper legal procedure, and an enquiry in a Court having jurisdiction to make it. The offence which we considered *primâ facie* to have been committed was committed in Calcutta, and Sections 63, 64, Code of Criminal Procedure, would not apply. The proper officer to make the preliminary enquiry and, if necessary, to commit would appear to be one of the Police Magistrates of Calcutta; but it is not necessary for us to make any direction on this point.

The proceedings of the Assistant Magistrate must be quashed.

Mitter, J.—I also think that the proceedings of the Assistant Magistrate must be quashed. We have only sanctioned a prosecution for perjury, but the proceedings must be instituted in the Court having jurisdiction to entertain the criminal charge of perjury against the prisoner. The Assistant Magistrate of Patna, it seems to me, has no jurisdiction to take cognizance of the charge that has been brought against the applicant. The proceedings of the Assistant Magistrate in this case must, therefore, be quashed.

The 26th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Conviction—Evidence.

(Miscellaneous Case.)

Ali Meah and another, *Petitioners,*

versus

The Magistrate of Chittagong, *Opposite Party.*

Baboo Akhil Chunder Sein for the Petitioners.

It is irregular and illegal to base a conviction on evidence not recorded in the presence of the accused, but taken previously and merely read over to him on another day.

Glover, J.—IN this case, I think, we are bound to interfere under Section 297, Criminal Procedure Code, on the ground that there has been a material error in the judicial proceedings of the Magistrate.

It is true that the witnesses for the prosecution were in Court when the accused were brought before it, and that the latter had the opportunity of cross-examination; but it has been often ruled by this Court that it is irregular and illegal to base a conviction on evidence not recorded in the presence of the accused, but taken previously and merely read over to him on another day, and the reason is obvious. Supposing the charge to be false, the witnesses are not subjected to any test; what they said on a previous occasion, in the absence of the accused and with no fear of cross-examination before their eyes, is taken as true, and the accused is deprived of the advantage arising from unexplained inconsistencies or discrepancies which might have occurred had the prosecution-witnesses been made to tell their story over again and in his presence. It may be that, in this particular case, no advantage has been lost to the accused, but he has a right to all the safeguards which the law allows him.

The order of the Magistrate must be quashed, and, if he thinks proper to proceed against the accused *de novo*, he must do it in a regular way.

The 26th January 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Admissions.

(Miscellaneous Case.)

Goloke Chunder Chowdhry, *Petitioner,*

versus

The Magistrate of Chittagong, *Opposite Party.*

Baboo Aukhil Chunder Sein for the Petitioner.

If admissions are taken as evidence, they must be taken as a whole.

Glover, J.—In the matter of Goloke Chunder Chowdhry, who has been ordered by the Magistrate, under Section 491, Code of Criminal Procedure, to give securities to keep the peace, I think we must say that the order is not warranted by law.

Putting aside the question of any personal action on the part of Goloke Chunder Chowdhry, I find it admitted by the Magistrate that the provisions of the Section were not complied with.

Explanation 1, Section 491, Code of Criminal Procedure, lays it down very clearly that, before a person can be bound over to keep the peace, there must be an adjudication on evidence taken before him.

Now, the Magistrate's proceedings show that no such evidence was taken. Goloke Chunder Chowdhry was summoned, and his admissions then made have been taken as evidence; but, if they be so taken, they must clearly be taken as a whole, and the gist of Goloke's admission was that, although he was then aware that his servants had behaved improperly, he did not know it before, and that, since he had known it, he had discharged several of them from his service.

There was nothing in these admissions amounting to a confession of guilt; and as the Magistrate himself allows there was no other evidence taken, there was no compliance with the Section.

The order, therefore, for taking security under Section 491, Code of Criminal Procedure, was illegal, and must be set aside.

The 3rd February 1876.

Present:

The Hon'ble F. B. Kemp and W. F. McDonell, *Judges.*

Recognizances to keep the peace—Act X. of 1872, Section 391.

(Miscellaneous Case.)

Huree Mohun Mullick, *Petitioner,*

versus

Kalinath Roy, *Opposite Party.*

Baboo Gopal Lall Mitter for the Petitioner.

A party cannot be called upon, under Act X. of 1872, Section 391, to enter into recognizances to keep the peace, unless the evidence points to some specific conduct or act on his part from which a reasonable or immediate inference can be drawn that he is likely to commit a breach of the peace.

Kemp, J.—We think that in this case the order of the Deputy Magistrate must be quashed. The Deputy Magistrate, under Section 391, has called upon the petitioner, Huree Mohun Mullick, to enter into recognizances to keep the peace to the amount of Rs. 1,000 for a period of one year. The record of the case was sent for, and on referring to the evidence of the three witnesses upon whom the Deputy Magistrate relies, namely, the witnesses Chunder Bhoosun Gangooly, Gourmohun Bhuttacharjee, and Ram Ruttun Bhuttacharjee, we do not find that that evidence points to any specific conduct or act on the part of the petitioner Huree Mohun Mullick from which any reasonable or immediate inference can be drawn that he was likely to commit a breach of the peace. The order of the Deputy Magistrate is, therefore, quashed.

The ruling in Vol. XXII., Weekly Reporter, page 79, Criminal Rulings, supports this view.

The 3rd February 1876.

Present:

The Hon'ble F. B. Kemp and W. F. McDonell, *Judges.*

Act X. of 1872 (Criminal Procedure Code), Section 530.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Shahabad.

Byjnath Sahoo, *Petitioner,*

versus

Rugoonath Pershad, *Opposite Party.*

Baboo Kali Kishen Sein for the Petitioner.

Baboo Mohesh Chunder Chowdhry for the Opposite Party.

Where each of two parties claimed the same share of certain property as a whole estate, neither alleging that the other was joint with him in any way, and the Magistrate, without reference to the right of possession, went into the question of who was in possession, and maintained the possession of the party found in possession, the High Court HELD that the case fell under Act X. of 1872, Section 530, and saw no necessity to interfere with the decision.

Kemp, J.—THIS case has been referred to us by the Sessions Judge of Shahabad, under the provision of Sections 295 of the Code, recommending that the order of the Joint Magistrate should be reversed, inasmuch as Section 530 of the Code does not apply, the dispute being about shares in ijmalee property. Before submitting the case to this Court, the Joint Magistrate was called upon to explain. His explanation is briefly to this effect, that the property in question is not ijmalee; that, although it has not been divided by metes and bounds under the butwarra-law, the 5 annas 4 gundahs share has been held separate from time immemorial, that is to say, that both the lands and ryots representing the 5 annas 4 gundahs share have been separated off from the remainder, and that both sides claim the 5 annas 4 gundahs share as an undivided whole. I do not think we can go behind the order of reference, and it is simply this, whether, the property being undivided, the Section applies or not. It does not appear that this point was raised before the Magistrate in any way; on the contrary, Byjnath Sahoo, in his written statement, clearly stated that the property, namely, the 5 annas 4 gundahs, had been owned and held by him and his ancestors by virtue of purchase, and he asked to be maintained in possession. Rugoonath, the opposite party, who has been maintained in possession by the Joint Magistrate, also claimed the 5 annas 4 gundahs share of property separated from the 16 annas. Each party, as already observed, claimed the as a whole estate, not alleging that the other party was joint with him in any way. The Joint Magistrate, under the Section, without reference to the right to possession, went into the question of who was in possession. He found in favor of Rugoonath, and maintained him in possession. We think, therefore, looking to the question simply as referred to us by the Judge, *viz.*, whether the case comes under Section 530 or not, that it does come under that Section, and we see no necessity for interfering with the decision of the Joint Magistrate in the case.

The 11th February 1876.

Present:

The Hon'ble F. A. Glover and W. F. McDonell, *Judges.*

Certificate of administration—Act X. of 1872, Section 530.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Tirhoot.

Musst. Anuragee Koowar, mother and guardian of Ramanugro Dass, *Applicant,*

versus

Ramruchya Dass, *Objector.*

The grant of a certificate under Act XXVII. of 1860 is not sufficient proof of possession to entitle the holder to an order under the Criminal Procedure Code, Section 530, declaring him to be in possession.

Reference.—MOHUNT RAM CHURN DASS, of Mouzah Pootah, died in poos 1282 F. S, leaving a minor son, Ramanugro Dass. In due course, applications were made to this Court, on the Civil Side, by Musst. Anuragee Koowar, mother of the said minor, and by Ramruchya Dass, disciple of the deceased Mohunt, for certificates under Act XXVII. of 1860, the mother also applying for a certificate under Act XL. of 1858.

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rentually, certificates were granted to samut Anuragee Koowar and Ramruchya s, respectively, under Act XL. of 1858 and XXVII. of 1860.

ubsequently, both parties filed petitions, ther with certificates obtained by them, he Court of the Assistant Magistrate of dhoobunee, claiming possession over the perty, immoveable and moveable, left by deceased Mohunt, and praying that an er might be issued to the police to pre- t any breach of the peace occurring.

On this, the Assistant Magistrate of dhoobunee passed the following order:— "Both parties cannot hold the property. th claim actually to hold the property. take the Judge's certificate, granted der Act XXVII. of 1860, to be the most ent and direct order, and on it pass an der under Section 530, Code of Criminal ocedure, declaring Ramruchya Dass to be possession, and forbidding any disturbce of possession until ousted by due urse of law. (Police to take measures to event any disturbance.)"

Such order, in my opinion, is illegal. The rtificate obtained by Ramruchya Dass mply empowers the latter to collect and y debts due to and by the deceased lohunt, and is in no way sufficient by itself justify an order declaring him to be in ossession of deceased's property, and forbiding all disturbance of such possession until usted by due course of law.

I think, for this reason, that the order of he Assistant Magistrate should be reversed, nd that he should be directed to record a rmal proceeding under Section 530, Code of Criminal Procedure; to call upon both arties to adduce proof of actual possession f the property in dispute, and then to issue uch orders as he may deem proper, with egard to the retaining of possession by either one or other of the parties.

Judgment of the High Court.

Glover, J.—In accordance with the recommendation of the Sessions Judge, which, we may observe, is a very proper one, we direct the Assistant Magistrate to take proceeding, if he thinks it necessary, to bring the case under Section 530, Code of Criminal Procedure, in a regular and formal way. The grant of a certificate under Act XXVII. of 1860 is not sufficient proof of possession, nor does it entitle the holder to be put into possession of any property of a deceased person.

The 11th February 1876.

Present:

The Hon'ble F. A. Glover and W. F. McDonell, *Judges.*

Sessions trials—Amendment of charge—Magistrate and Judge.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of West Burdwan.

Ramdhone Acharjee and others, *Petitioners.*

Where a Magistrate gives reasons for committing a case for trial in a certain way, the Sessions Judge must either accept the charges as framed or frame others himself; he is not authorized by the Criminal Procedure Code to insist on a redrawing of the charge by the Magistrate, unless he specifies the charge which he wishes to be sent up.

Glover, J.—By Section 446, Code of Criminal Procedure, the Sessions Judge has full power to amend charges or to draw up new ones. In the present case, he has the Magistrate's record before him, which must contain all the necessary dates, as well as all other memoranda necessary for the framing of definite charges with specifications of time, place, and amount, such as the Sessions Judge wishes to have tried.

If the Magistrate thinks that the charges drawn up by him are sufficient, and declines to amend them, the only way of arranging matters is for the Sessions Judge to draw up new charges himself upon the basis of the evidence already recorded.

If, during the course of the trial, other facts as to dates, places, or amounts, are elucidated, which seem to make those charges incomplete, they can be again amended or changed, a fresh defence being taken from the accused without any extra delay.

The Magistrate, we may observe, has given reasons for committing the case for trial in the way that he has done, and the Sessions Judge must, we think, either accept the charges as framed or frame others himself. There is no Section of the Procedure Code which gives him authority to insist on a redrawing of the charge by the Magistrate in cases committed to the Sessions, unless he specifies the charge which he wishes to be sent up.

The 11th February 1876.

Present:

The Hon'ble F. A. Glover and W. F. McDonell, *Judges.*

Code of Criminal Procedure, Section 36—Jurisdiction of High Court.

The Queen

versus

Sham Soonder Dass, *Appellant.*

Baboo Grish Chunder Ghose for the Appellant.

Where a Deputy Commissioner's order requires, under Act X. of 1872, Section 36, the sanction of the Sessions Judge, the High Court has no jurisdiction to entertain an appeal from it until so sanctioned.

Glover, J.—UNDER Section 36 of the Code of Criminal Procedure, this order of the Officiating Deputy Commissioner of Cachar, being one of imprisonment for four years, ought to have been submitted for sanction to the Sessions Judge of his district.

We have no jurisdiction to entertain the appeal until the Sessions Judge has sanctioned the Deputy Commissioner's order, and in this case it may very well be that no further appeal will be necessary.

The record is returned to the Deputy Commissioner with directions to submit his order regarding Sham Soonder Dass to the Sessions Judge for sanction. The appeal before us is struck off the file.

The 14th February 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Code of Criminal Procedure, Section 530—Jurisdiction of Criminal Court—Contested possession—Execution.

(Miscellaneous Case.)

Nobin Chunder Koondoo and another *Petitioners,*

versus

Jogendronath Bhuttacharjee and another, *Opposite Party.*

Baboos Sreenath Dass and *Bungshidhur Sein* for Petitioners.

Baboos Bama Churn Banerjee and *Debender Chunder Ghose* for the Opposite Party.

The Criminal Court has jurisdiction, under Act X. of 1872, Section 530, to determine questions of contested possession between parties who are not in immediate possession of the subject-matter of dispute, but claim rent from tenants who actually occupy it.

The act of a process-peon delivering over possession of the disputed land to the purchaser, as part of a tenure sold in execution, does not take away the power of a Magistrate to enquire into the question of possession between the parties under Section 530.

Mitter, J.—ON this rule coming on for hearing, the opposite party, who was called upon to show cause, has not appeared. We have looked into the records ourselves, and we are satisfied that the rule ought to be made absolute.

The Deputy Magistrate has, it appears to me, refused to pass any order under Section 530 of Act X. of 1872 upon two grounds, *viz.*, (1) that the subject-matter of dispute is land not in the immediate possession of the disputing parties, but in the occupancy of ryots, and the dispute is with reference to the right to collect rents from them; and (2) that the Civil Court peon has delivered over the possession of it to the second party. It has been now settled by more than one decision of this Court that the Criminal Court has jurisdiction under Section 530 to determine questions of contested possession between parties who are not in immediate possession of the subject-matter of dispute, but claim to collect rent from tenants who actually occupy it. The Deputy Magistrate was, therefore, in error in refusing jurisdiction upon the first ground. As regards the second ground, if it had appeared that, by a final decree binding between the parties before him, the question of title had been conclusively determined, he would have been justified in refusing to proceed under Section 530. But what appears to have happened was simply this. In execution of a rent-decree, a tenure belonging to a party unconnected with this proceeding was sold and purchased by the second party. A peon deputed by the Execution Court, in which the tenure was sold, has delivered over possession of the disputed land as part of the tenure sold to the purchaser, *i. e.*, the second party. That proceeding cannot prejudice the first party, and does not take away the power of the Deputy Magistrate to enquire into the disputed question of possession between parties before him under Section 530 of Act X. of 1872. We therefore think that his order is erroneous on both grounds; and, making the rule absolute with costs, we remit the records to him to proceed with the case according to the provisions of the Section quoted above.

The 16th February 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Summary trials— Procedure how determined.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Beerbhoom.

Ram Chunder Chatterjee

versus

Kanye Laha and another.

Whether a case is triable summarily or not must be determined by the complaint, not by an estimate formed by the Magistrate (*e.g.*, of the worth of the property which the accused is charged with having stolen) after evidence has been recorded; and such estimate cannot retrospectively warrant a mode of trial which was originally illegal.

Reference.—THE prisoners were charged before the Magistrate with theft and criminal trespass (Sections 379 and 447, Indian Penal Code); their case was tried summarily; and the prisoners were sentenced as follows: Kanye to three months' rigorous imprisonment and to pay a fine of Rs. 50, and Buckronath to one month's rigorous imprisonment.

The former has appealed to me, and the latter has made an application for a reference to the High Court.

In his appeal Kanye made an affidavit, stating that he had had no opportunity of cross-examining the witnesses for the prosecution; and as the dates given in the Magistrate's register seemed to support his allegation, I enquired of the Magistrate if such was the case. He states that the witnesses for the prosecution were examined on the 17th, before Kanye was convicted.

Believing still, however, that the Magistrate had made some mistake, I again addressed him on the subject, quoting the several dates on which the parties and their witnesses had appeared, and pointing out that the register at least showed no such examination as mentioned by him.

In reply, he states that he did re-examine the witnesses for the prosecution in the presence of the accused, but did not record its substance, as the depositions on both occasions were the same.

It seems to me somewhat odd how the witnesses for the prosecution were ever examined in the first instance in the absence of the accused; but the irregularity, which seems to me to be fatal to the proceeding, lies in the omission of the Magistrate to record the substance of their *re-examination*, which could alone be said to be legal evidence against the accused.

In cases where an appeal lies, the Magistrate is (under the law) bound to record a judgment, embodying the substance of the evidence upon which the conviction is founded, together with the particulars mentioned in Section 227, Criminal Procedure Code. But here the judgment contains no substance of evidence whatsoever, while the memorandum made by the Magistrate (which he seems to think should not be reverted to by the Appellate Court, *vide* his letter No. 46, dated the 12th instant) is not the substance of any evidence taken in presence of the accused; and, not being so, cannot, I submit, be legally considered.

I might have dealt with the case of the appellant Kanye myself by releasing him; but as the case must have gone to the Honorable Court on another irregularity, affecting the applicant Buckronath, and in which Kanye is also interested, I have thought it right to submit the whole record to the High Court for orders.

The second irregularity I speak of consists in this :—

The complainant, in his petition of complaint, valued his property at Rs. 100. Such being the case, the Magistrate ought not to have tried the case summarily; nor do I think that any *ex post facto* proceeding, such as that taken under Section 308 (and which relates to the amount of compensation awarded to the complainant), can, as the Magistrate opines could, render his enquiry regular.

It appears to me that the Magistrate's proper course on receiving the complaint was to have determined the value of the stolen property if he desired to try it summarily; or else to have taken it up in the regular way.

Looking at the above facts, it appears to me that the proceedings of the Magistrate have been from beginning to end irregular; that they ought to be quashed; and that a new trial should be ordered.

Judgment of the High Court.

Jackson, J.—The complainant in this case charged that the property stolen was worth Rs. 100. This took the case out of the category of those triable summarily.

The evidence might fail to show that the property was, in fact, worth so much, as it might fail to establish the charge against the accused, or even to prove that any offence had been committed, but it is the complaint which, if it is proceeded with at all, must determine the mode of procedure.

The estimate formed by the Magistrate could only be arrived at after the evidence had been recorded, and could not retrospectively warrant a mode of trial which was originally illegal. The proceedings are quashed.

The 16th February 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Summary procedure—Act V. of 1861, Section 29—Indian Penal Code, Sections 29 and 148—Code of Criminal Procedure, Section 8.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Rungpore.

The Queen

versus

Golam Arabee, late head-constable, Rungpore Police.

Acts or omissions punishable under Act V. of 1861, Section 29, come within the category of "offences punishable under any law other than the Indian Penal Code" (Code of Criminal Procedure, Section 8), and those offences likewise fall within the terms of Section 148 of the same Code.

Reference.—The applicant, Golam Arabee, is a head-constable in the Rungpore Police. He was, in the first instance, as it appears from the District Magistrate's judgment, tried for wrongful restraint by Mr. Collier, Assistant Magistrate, who acquitted him. The Magistrate, however, subsequently tried him summarily under the Criminal Procedure Code, and convicted him under Section 29, Act V. of 1861 (Police Act), sentencing him to two months' rigorous imprisonment under that Section.

I am of opinion that the conviction is erroneous, and that it should be set aside for the following reasons. Section 148, Code of Criminal Procedure, does not, I submit, apply to the delinquencies mentioned in Section 29, Act V. of 1861, which are "offences" as contemplated in Section 14 Code of Criminal Procedure. They do not come within the scope of Section 40, Indian Penal Code, and I apprehend accordingly they not come within the scope of Section 14 Code of Criminal Procedure. On this point it may be observed that the word "fine" is not mentioned in Section 29, Act V. of 1861. Hence the summary trial of the case was illegal and cannot stand, and the error is material, as by it the accused has been deprived of his right of appeal.

The terms of the Magistrate's judgment appear to show that the severe sentence passed by him was based upon what he terms the circumstances of the case, and he goes on to refer to what, as he considers, the circumstances were, and then proceeds to sentence the accused. In effect, the sentence appears to me to have been passed upon a view of the case which has not been made out by evidence. The Magistrate himself admits that there is only evidence to the arrest (which arrest, I may remark, appears not to have been admitted by the applicant), and yet passes this severe sentence upon attendant circumstances. Now, I consider that, before this can be done, it should have been proved beyond any reasonable doubt, and not merely, as it were, departmentally surmised, that the women were kept or allowed to be kept by the head-constable for guilty purposes of his own, and that he in consequence neglected to report the apprehension in question, if this apprehension was held to have been proved to have taken place. I observe nothing in the evidence taken by the Magistrate which legally bears out this serious aspect of the case, and the statement of the applicant before the Magistrate, which I have marked A, contains no admission either of an arrest or of improper intimacy on his part with the women.

The punishment inflicted by the Magistrate for the alleged offence under Section 132 appears to me far too severe, inasmuch as it is, I consider, erroneous, and not warranted by law to pass a severe sentence in a judicial enquiry in circumstances not borne out by legal evidence. Further, it has been held by the High Court that, to support a conviction under that Section, not only mere neglect, but deliberate and intentional violation of duty, must be proved. Case of Radhoo Singh, High Court Ruling, 2nd March 1872.

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Upon these grounds, I would beg to recommend that the order of the District Magistrate should be reversed, and the sentence set aside. The applicant has, I understand, been for some months, *i.e.*, since the Magistrate's order, under suspension, and I think that further proceedings against him are not now desirable.

The explanation of the District Magistrate will be called for, and accompany this reference. The applicant has been admitted to bail, pending the hearing of this case.

Judgment of the High Court.

Jackson, J.—We think there can be no doubt that acts or omissions punishable under Section 29, Act V. of 1861, come within the category of "offences punishable under any law other than the Indian Penal Code," as mentioned in Section 8, Code of Criminal Procedure.

That being so, those offences, in our opinion, likewise fall within the terms of Section 148 of the same Code, because the word "penalty," used in Section 29 of the Police Act, means the same thing as "fine," and the offence is really punishable with fine. It may be observed that, in the 39th Section, the word "fine" is used as synonymous with "penalty."

The offence in question was, therefore, triable by summary procedure, and we are inclined to say that, if there be any class of cases in which that procedure is desirable, it is in cases where the conduct of a police-officer is being enquired into by a Magistrate under Section 29.

The graver charges which might have arisen in this case had already been tried and disposed of by another officer, and the departmental charge alone remained.

We think the sentence passed was not unduly severe.

The Sessions Judge does not justify his order admitting the petitioner to bail, and we are not aware of anything which authorized him to make such order.

There was excessive delay in submitting the case, and this has not been explained to our satisfaction.

The 18th February 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Code of Criminal Procedure, Sections 530 and 295—Joint Sessions Judge—Jurisdiction.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Joint Sessions Judge of Julpigoree and Darjeeling.

Shoindoo Noshyo, Agent of Joggeshur Singh, *Plaintiff,*

versus

Rung Lall Jhah and others, *Defendants.*

An order of a Magistrate retaining parties in possession of land can only be passed after due judicial enquiry, as required by the Code of Criminal Procedure, Section 530.

A Joint Sessions Judge has no power to act in such cases under Section 295, which applies only to the Sessions Judge of the Division.

Reference.—One Shoindoo Noshyo, Karpurdaz of Joggeshur Singh, presented a petition to the Deputy Commissioner of Julpigoree on the 16th November last, and stated that Rung Lall Jhah and nine others were about to cut his dhan forcibly, and he, therefore, prayed the Deputy Commissioner, under Section 13, Act V. of 1861, to grant him the assistance of a police-constable to prevent his paddy being cut. The Deputy Commissioner, on this, ordered that Mr. Muller, a Second-class Deputy Magistrate, should proceed to the land in question, and enquire whether there was any such dispute existing as was likely to cause a breach of the peace, and as would warrant the request of the petitioner for a constable being granted. Mr. Muller, on the 19th November, submitted a report, stating that there was a quarrel, likely to cause a breach of the peace, existing between Singeshur Singh, Chattrodhari Singh, Ram Narain Singh, and their servant Shoindoo Noshyo, on the one hand, and Rung Lall Jhah, Shakurdin, Bajaroo, Jawaboo, and Goyshoo, on the other. He further stated that the three last-mentioned persons were in possession of the land and crops in dispute; that he had ordered the dhan not to be cut till the Deputy Commissioner's orders had been passed; and that he had directed the above-mentioned parties to be in attendance at the Deputy Commissioner's cutchery. On the same date, the 19th November, the

Deputy Commissioner recorded an order that the above mentioned parties were present in his cutchery; that the report of Mr. Muller was sufficient to show that a breach of the peace was to be feared, and that, under Section 530, Code of Criminal Procedure, each party was to give in on the following day a written statement of his claim to actual possession of the crops in question. Both parties then gave in written statements, and on the 22nd November the Deputy Commissioner recorded that, from the written statements filed by the parties, as well as from the local enquiry made by Mr. Muller, it was evident that actual possession was admitted to be held by Bajaroo, Jawaboo, and other ryots, and that, under these circumstances, he would maintain the ryots in possession, leaving the other party to enforce any right they might have in the Courts.

The Deputy Commissioner accordingly passed the following orders: "Jote Chat Satmarah, Talook Satmarah, Pergunnah Bada: Of this jote (Chat Satmarah) Bajaroo Noshyo, Jawaboo Noshyo, Goyshoo Noshyo, Nodon Noshyo, and Shaibullah Noshyo, are hereby declared to be entitled to retain possession until ousted by due course of law, and Joggeshur Singh, Singeshur Singh, Ram Narain Singh, Chattrodhari Singh, Shoindoo Noshyo, and all others, are hereby forbidden to interfere with their possession until such time as they may be ousted by law."

I consider this order to be contrary to law, inasmuch as the question of possession has not been decided, as it ought to have been, in accordance with the explanation annexed to Section 530, Code of Criminal Procedure, on evidence taken before the Deputy Commissioner. Neither the Deputy Commissioner nor Mr. Muller recorded any evidence at all, and, even if Mr. Muller had done so, his report could not have been received as evidence in the case. Further, the enquiry made by Mr. Muller cannot be regarded as a local enquiry held under Section 533, Code of Criminal Procedure, firstly, because no proceedings under Section 530 had been commenced when he was deputed to make the enquiry; and, secondly, because he is Second-class, and not a First-class, Magistrate.

I have called upon the Deputy Commissioner for any explanation he may wish to offer in the case, and he has recorded certain remarks which are dated 20th December, and which will be found on the last page of the record. In these the Deputy Commissioner states that, in the written statement put in by the petitioners in this case, it is admitted that those whose possession the Deputy Commissioner has upheld are in actual possession of the land in dispute; that the rest of the dispute is as to title—whether those admitted by both parties to be in possession are so, as the adhiari projahs of the petitioners, or not? That the written statements are in themselves in the case sufficient evidence as to who is in possession, and prove this fact; and the Court did not deem it necessary under such circumstances to record further evidence on that point.

But I find, on examining the petition of the petitioners (that is, Singeshur Singh, &c.), dated 20th November, that they only admit that the opposite party are in actual possession of a portion of Jote Chat Satmarah as their "adhiari" tenants—that is, as their joint cultivators—Bajaroo, Jawaboo and Goyshoo cultivating the land, and paying half the produce to petitioners in lieu of rent. They distinctly say that they themselves cultivate a certain portion of the jote. Now, the Deputy Commissioner, by his order dated 22nd November, gave the ryots Bajaroo, Jawaboo, Goyshoo, &c., possession of the whole jote. Whether he intended to do so or not, his order is open to no other interpretation. The boundaries of the land in dispute are not laid down, and, under this order, the ryots, it would appear to me, can take possession of such portions of Jote Chat Satmarah as have hitherto been in the undisputed possession of the petitioners. Hence I consider that the order of the Deputy Commissioner should be quashed, as it does the first party, Singeshur Singh and others, a considerable injustice, as well as because, as I have pointed out in my 4th para., it is illegal, not having been passed after due judicial enquiry as required by the terms of Section 530, Code of Criminal Procedure.

Judgment of the High Court.

McDonell, J.—The order of the Deputy Commissioner, not having been passed after due judicial enquiry, as required by Section 530, Criminal Procedure Code, must be quashed.

We think it right to observe that the Joint Sessions Judge appears to have no power to act in such cases under Section 295, Code of Criminal Procedure, which applies only to the Sessions Judge of the Division.

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The 28th February 1876.

Present:

The Hon'ble F. A. Glover and W. F. McDonell, *Judges.*

Indian Penal Code, Section 193—Onus probandi.

The Queen

versus

Sarjan Miya and others, *Appellants.*

In a prosecution for intentionally giving false evidence in a judicial proceeding, under the Penal Code, Section 193, it is for the prosecution to show clearly that the prisoner's statements were false.

McDonell, J.—THE prisoners have been convicted of intentionally giving false evidence in a stage of judicial proceeding, Section 193, Indian Penal Code. Before they could be convicted of the offence, it was necessary for the prosecution to prove distinctly that the statements made by the prisoners (appellants) were false, and this we consider that they have failed to do. The prisoners asserted that a police-constable had arrested two men, and let them go on receiving Rs. 8. The evidence adduced by the prosecution merely shows that the two men were not arrested on a certain morning. Now, in fact, this is admitted by the prisoners, who assert that the arrest was in the evening; and, in proof of their assertion, they have produced a number of witnesses, amongst others one of the men said to have been arrested. The Judge has, no doubt, discredited these witnesses, but we are not prepared to say they have deposed falsely. But, without giving any decided opinion as to whether we hold the evidence for the defence to be as untrustworthy as the Judge thinks, we consider that it was for the prosecution to show clearly that the prisoners' statements were false. We are not at all satisfied with the evidence of the constable; on the first occasion, he distinctly stated that none of the witnesses to the surathal knew how to write; he afterwards, when it was proved that some of them could write, tried to explain that the reason why they had not signed the surathal was because he had no ink with him, and could not find any, and that, therefore, he had merely made them touch the pen. Taking all the circumstances of the case into consideration, we set aside the order of the Sessions Judge, and direct the release of the prisoners.

The 14th March 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Confession of prisoner—Charge of murder—New trial.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of murder.

The Queen

versus

Sonaoollah, *Appellant.*

Where a person accused of murder acknowledged having struck his victim, but repudiated the intention to murder, and the Sessions Judge accepted this acknowledgment as a plea of guilty, and omitted to record any further evidence: HELD that the Judge was bound to accept the statement of the accused as a whole, if it was taken as a confession at all. Conviction for murder accordingly set aside, and new trial ordered.

Morris, J.—IN this case the Court of Session has passed sentence of death, and the proceedings have been referred to the High Court under Section 287 of the Criminal Procedure Code.

It appears to us that the trial has been defective, and we annul the conviction, and (under Section 288) order a new trial on the same charge.

The Sessions Judge treats the case as one in which the prisoner has pleaded guilty to a charge of murder; and on that plea has convicted him of murder, and sentenced him to death. But, in truth, the prisoner did not plead guilty unconditionally and absolutely, for his plea was accompanied by a statement which, in its general effect, was that, although he did strike his wife on the neck with a *dão*, he never intended to kill her; that, having had a dispute with his wife as to the amount of money expended by him on his son's marriage, he seized a *dão*, and struck her; but that he did not cut her throat after striking her; that they were both old people, and had been married long, and had always lived on good terms, and it was not likely he should have intended to kill her.

The Sessions Judge did not formally record any evidence or examine any of the witnesses, but convicted the prisoner solely

on his plea of guilty and the statements made by him before the Sessions Court and before the Magistrate. The Judge remarks: "I am not bound to accept these confessions "as a whole; but I am at liberty partly to "believe them and partly to reject them. "And I feel that I cannot but reject that "part of the prisoner's statement in which "he says that he did not intend to kill his "wife." In this the Sessions Judge is quite wrong. If the Court convicts a man exclusively on his own admissions, it is bound to take the admissions as a whole, and is not entitled to pick out and act only on those parts which tell most against him. If the case is fully gone into, and the evidence for the prosecution is recorded, the matter is, of course, different. For *then* the whole facts are before the Court, and the Judge is at liberty to draw such conclusions as legitimately arise from those facts.

In the present instance, the prisoner's plea of "guilty" cannot fairly be read except in connection with the statement which accompanied it, *i. e.*, which he made before the Sessions Judge; and being followed up by that statement, it ought to have been treated as practically a plea of "not guilty," and the case should have been fully gone into, with a view to discovering, if possible, the true character and extent of the prisoner's offence.

In a note appended to his judgment, the Judge says: "I wish to say that, in writing "above that the only direct evidence was the "prisoner's confession, I do not intend in any "way to throw any sort of slur on the strong "circumstantial evidence there is of the fact "of the killing. All I meant to say was "that the only direct evidence as to the "prisoner's frame of mind and purpose at "the time he committed the act is that sup-"plied by his own confession." We are at a loss to know where "the strong circumstantial evidence" here referred to is to be found. There is none whatever that we can see on the record of the trial held by the Sessions Judge. Possibly the Judge may have had in his mind the evidence given before the Committing Magistrate. But he had no right whatever to treat that evidence as part of the grounds for the conviction of the prisoner. For if it was necessary to strengthen the case by having any evidence save that afforded by the prisoner's own plea, that evidence should have been formally recorded; and, in order to do that, it was necessary that the witnesses should have been examined in the usual manner by the Sessions Judge.

Altogether the case has been disposed of in a most loose and irregular manner; and considering the importance of the case to the person accused, whose life is at stake, it seems to us absolutely necessary that there should be a new trial.

We do not mean to say that, if the prisoner had really pleaded guilty (*i.e.*, had fully admitted all the ingredients of the charge of murder after the Judge had taken care to ascertain that he understood all that he was admitting), it would have been necessary for the Judge to go further into the case. Clearly, under Section 237, the plea might have been then recorded, and the prisoner might have been convicted thereon. But the whole matter is altered when the prisoner pleads in such a manner that it is anything but certain that he intends to admit fully all the ingredients of the charge. Still further is it altered if the Sessions Judge, instead of acting on the plea as directed in Section 232, bases his conviction in some degree on other evidence which is not duly recorded by him and, in fact, forms no part of the record of the Sessions Court.

The 15th March 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Criminal Procedure Code, Sections 530 and 531 —Possession by Joint Manager.

(Miscellaneous Case.)

Kassim Hassim Soorty and others, *Petitioners,*

versus

Abrahim Soleman and others, *Opposite Party.*

Messrs. Evans and *M. P. Gasper* and *Babu Mohinee Mohun Roy* for the Petitioners.

Mr. Branson for the Opposite Party.

A mookhtar holding and managing a burial-ground for several proprietors cannot constitute himself a judge

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ir respective rights. A case in which several is dispute about the proprietary right in a burial-d should be tried in a Civil Court, and does not ly come under Section 530 or Section 532 of the of Criminal Procedure.

acpherson, J.—THE order made by the h of Magistrates in this case runs as ws : "We therefore declare that Kassim ssim Soorty, the manager of the Randir ple, was in actual possession of the dis-ted burial-ground when the dispute curred, and that he be retained in posses-n of the same until ousted by due course law ; and that the people of Kattore and rian be forbidden to create any disturb-ce in future until such time."

appears to us that this order is clearly g, and that it must be set aside. Kassim sim Soorty is (upon the evidence put re the Court by him) in possession as mookhtar of all the Soorties, that is to as the mookhtar of the Randir, and the tore, and the Burian Soorties. He was ointed mookhtar by them all jointly for purpose of managing this burial-ground; so far as the present case is concerned, it tters nothing whether the land was or was originally purchased by the Randir ple alone.

Kassim Hassim Soorty being the mookhtar the Kattore and Burian people as well as the Randir people, and being in possession such mookhtar, his possession at the time en the complaint was made was, in law, d in fact, just as much the possession of the ttore and Burian people as of the Randir ple. The nature of his possession cannot altered, and is not altered, by his choosing say that, from a particular date, he held for e Randir people only, and not for the others o had joined with the Randir men in put-g him in possession as their manager. these persons, who have been generally scribed as the Randir, the Kattore, and e Burian Soorties are interested more or s in this burial-ground; and a serious spute has now arisen as to what is the ecise nature of the interests which they ve respectively. This dispute can only be ttled in a Court of law, where the interests the various parties can be ascertained and etermined. But Kassim Hassim Soorty, e manager, who has received his appoint-ent from the Kattore and Burian people st as much as from the Randir people, has o power to eject or keep out one party, hile he supports and admits the other. It is not for one who is a mookhtar or manager or servant to constitute himself a judge of the rights of the parties who have put him in possession and under whom he holds, and he cannot keep out one party, because he thinks that they are not doing what they ought to do.

The effect of the order made by the Bench of Magistrates is that they find that Kassim Hassim Soorty is in possession of the burial-ground as the manager of the Randir people only. But this is not so, for he has shown himself to be as much the manager of the Kattore and Burian people as of the Randir people, save that he now declines to recognize any right in the Kattore and Burian Soorties. The order of the Magistrates is, therefore, quashed, and the parties are left as they were.

This is really not a case in which any order can properly be made under either Section 530 or 532, Criminal Procedure Code, for the matter in dispute is one exclusively for the decision of a Civil Court. It will be the duty of the police to see that no breach of the peace occurs.

The 16th March 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Trial by Jury—Verdict on confessions—Confessions—Credibility of witnesses.

Reference to the High Court, under Section 263 of the Code of Criminal Procedure, by the Sessions Judge of Nuddea.

The Queen

versus

Wuzir Mundul and others, *Prisoners.*

Baboo Biprodass Mookerjee for the Prisoners.

Wherever trial by Jury exists, the verdict of the Jury must be accepted, unless it is manifestly and certainly wrong. A verdict based on voluntary confessions

is just as good as a verdict based on the testimony of credible witnesses. It is the province of a Jury to decide the credibility of witnesses.

Macpherson, J.—In this case the Sessions Judge, disagreeing with the Jury in the verdict of guilty found by them against the three prisoners, Wuzir Mundul, Hurri Ghose, and Asgar Biswas, has submitted the case to this Court under Section 263 of the Criminal Procedure Code, stating that, in his opinion, the prisoners should be acquitted.

We do not understand why the case should have been submitted to the High Court; for, if there be such a thing as trial by Jury at all in the district of Nuddea, it is clear that this verdict must stand.

In his charge to the Jury, the Sessions Judge said: "You will observe that there are "two species of evidence in this case—first, "the depositions of the witnesses Satya and "Gobindo; and, secondly, the confession of "three of the prisoners before the Sub-"Deputy Magistrate of Ranaghat. You heard "the witnesses subjected to a severe cross-"examination; and it is for you to say whe-"ther or not you believe them. If you think "their statements worthy of credit, then the "prisoners' own confessions, taken as corro-"borative evidence, would make a very "strong case. But if you are of opinion "that these witnesses are not to be believed, "then I advise you not to convict upon the "prisoners' confessions merely—confessions, "which, as you have heard, they now "retract."

The matter having been left to the Jury in this manner, the Jury returned a verdict of guilty. And, so far as we can see, they were fully justified in doing so.

The Sessions Judge has recorded it as his opinion that the Jury were incompetent to deal with the case; that they, in fact, did not understand the charges they were trying; and that the conviction seems to have been based solely on the prisoners' confessions. He is further of opinion that the principal witnesses for the prosecution broke down completely, and were unworthy of credit; and that the witness Satya (for committing rape, &c., on whom the prisoners were tried) is a woman of loose character.

But the Judge himself left it—and properly left it—to the Jury to consider how far these witnesses were worthy of credit; and it was, in truth, the special province of the Jury to deal with that question.

The Judge specially charged the Jury not to convict the prisoners on their confessions only; and we see no reason to suppose that they did convict on the confessions only. It may be that, when questioned by the Judge as to their verdict, they seemed to rely on the confessions chiefly. But that is no reason for supposing that they did not consider the evidence of the witnesses to be substantially true; and there is nothing to show that they deemed that evidence to be false.

If, however, it be the case that the prisoners did confess before the Sub-Deputy Magistrate of Ranaghat as alleged, there is no reason why the Judge should object to their being convicted on those confessions or should treat the confessions as being merely corroborative evidence. If there is no doubt about the confessions, a verdict based on them is just as good as a verdict based on the testimony of credible witnesses. If the prisoners did really voluntarily confess, their confessions are the best possible evidence against them. If, on the other hand, they did not confess at all, or if they were improperly made or induced to confess, then their so called confessions ought not to have been admitted as evidence against them. The Judge himself apparently had no doubt as to these confessions, except from the fact that the prisoners, when before him, denied that they ever made any confession at Ranaghat. A denial of that sort seems to us entitled to but little weight: for, if the Judge attaches any credit to it, he must believe that the Sub-Deputy Magistrate has been guilty of gross misconduct or of incapacity, and has falsely or blindly recorded statements as voluntarily made in his presence, which were either never made at all, or were made under the influence of an existing fear. If the Sessions Judge had any suspicions as to the conduct of the Sub-Deputy Magistrate, it was his clear duty to have instituted a searching inquiry into the circumstances under which the confessions were recorded, and he was bound to have rejected them wholly, if not proved to be that which they purport to be. As a matter of fact, there is nothing whatever on the record to indicate that any suspicion attaches to these confessions. And that the Judge had himself no suspicion as to them is shown by his receiving them as he did without any special inquiry or proof. Certainly, if the Sessions Judge thought that these confessions were not properly obtained, he has grievously neglected his duty.

While considering the question of these confessions, we may call attention to a serious defect in the mode in which this trial

has been conducted, as regards certain other statements which the prisoners are said to have made before the Assistant Magistrate in charge of Bongong. These statements were rejected by the Sessions Judge, because they were not recorded in accordance with the provisions of Section 346 of the Criminal Procedure Code, in such manner as to render the record admissible in the absence of evidence that the prisoners made the statements recorded. The Judge may have been right in holding that the statements made before the Assistant Magistrate of Bongong were not properly recorded, and that the record of them was, therefore, not admissible without further proof. But in that case the ordinary and natural course to pursue was, under the last clause of Section 346, to take evidence that the prisoners duly made the statements recorded. We do not understand why the Sessions Judge refrained from pursuing this course, and it further appears to us that his abstinence in this particular is confirmatory of the voluntary character, in his view, of the confessions made by the prisoners before the Sub-Deputy Magistrate of Ranaghat. For, had the Judge in any way distrusted those confessions, it seems to us impossible that he should have neglected to proceed under Section 346, and take evidence as to the statements recorded by the Assistant Magistrate of Bongong.

The confessions taken before the Sub-Deputy Magistrate of Ranaghat being before the Jury together with the evidence of the witnesses for the prosecution, there is no reason why we—who have to deal with the case as we should deal with an appeal (Section 263)—should set aside the verdict of the Jury. The Jury are appointed by law to decide questions of fact; and their verdict should not be interfered with, except when there has been a gross and unmistakeable miscarriage of justice. In the present instance, the Jury found a verdict such as they were entitled to do on the evidence, and on the whole case as placed before them by the Judge himself. That being so, there is no reason why we should say that they were wrong. When there is a patent and unquestionable failure of justice, it may be necessary for this Court to set the verdict of a Jury aside, in the exercise of the powers which the High Court has under Section 263. But, so long as trial by Jury exists, the verdict of the Jury must be accepted, and must stand, unless it is manifestly and certainly wrong.

Taking into consideration all the circumstances of the case, we sentence Wuzir Mundul to rigorous imprisonment for fifteen months under Section 376 of the Indian Penal Code; Hurri Ghose also to rigorous imprisonment for fifteen months under Sections 376 and 109; and Asgar Biswas to rigorous imprisonment for nine months under Sections 109 and 376. The sentence upon each will count from the date of conviction by the Jury.

The 24th March 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, A. G. Macpherson, C. Pontifex, and G. G. Morris, *Judges*.

Transfer of trial—Doubts regarding Jurymen.

In the matter of Zuhiruddin Hossein and others, *Petitioners*,

versus

The Queen, *Opposite Party*.

Messrs. J. T. Woodroffe, *Evans*, and *C. Gregory*, and *Moonshee Mahomed Yusuff* for the Petitioners.

Mr. C. Macrae and *Baboo Juggodanund Mookerjee* for the Opposite Party.

Where it is for any reason desirable to transfer the trial of a criminal case from one District Court to another, the proper course is to apply to the High Court, in its judicial capacity, on affidavits, in the usual way.

Garth, C. J.—I AM happy to say that, since last evening, some papers have been discovered, which will render any further discussion of this rule unnecessary.

It appears that, in 1869, in a case which in its circumstances very closely resembled the present, it was decided by no less than nine Judges of this Court that the proper course was to apply to the Court, sitting in its judicial capacity, upon affidavits, in the usual way; and I am extremely glad to find that no less distinguished a Judge than Mr. Justice Louis Jackson was one of the Judges who took part in that decision. An application in that case was made by Mr. Herschel, the Officiating Sessions Judge of Dacca, to the Registrar of this Court, suggesting that an order should be obtained for the transfer of the proceedings to the High Court for trial. I will read his letter.

"No. 484.

"From

"W. J. HERSCHEL, ESQ.,

"*Offg. Sessions Judge of*

"*Zillah Dacca,*

"To

"THE REGISTRAR OF THE HIGH

"COURT OF JUDICATURE AT

"FORT WILLIAM IN BENGAL.

"*Dated Dacca, 11th June 1869.*

"SIR,—I have the honor to request that "you will lay before the Hon'ble Judges "of the High Court the following circum-"stances, and solicit orders thereon for me.

"The Magistrate of Dacca has committed "the four principal Armenian residents of "this city on a charge of misappropriating "a large sum of money, the property of "the wealthiest Armenian of Dacca, on his "decease. The charge is brought on be-"half of Government on the motion of the "Educational Department, who claim the "money as intended for a school. Tech-"nically the Government is prosecutor also "under Section 68. The case is as import-"ant a case as well could occur in the eyes "of the educated classes of Dacca; and "the decision of it is naturally looked for-"ward to with great interest. But it "appears to me advisable that it should be "tried at Calcutta, and not here.

"My Jury-list is very ill-adapted for such "a case.

"It contains at present the following "names:—

Employ.	English.	Armenian.	Native Christian.	Hindoo.	Mahomedan.	Total.
Educational Department	3	1	...	38	...	42
Judges	1	...	...	1	1	3
Pleaders	...	...	...	33	2	35
Mookhtars	...	...	...	25	...	25
Amlahs of Government	...	...	...	6	...	6
Zemindars	...	5	...	17	5	27
Merchants, Bankers, and Agents ...	...	4	1	32	1	38
Planters	1	...	...	...	...	1
Editors	...	...	...	2	...	2
Priest	...	...	...	1	...	1
Doctor	...	...	...	1	...	1
Private Amlahs ...	...	...	...	6	...	6
	5	10	1	162	9	187

"The whole of the Educational Dep "ment (the most powerful interest as you "see in Dacca) must be set aside (for "present purpose). So must all Armeni "as there is not one of the ten who is "accused or otherwise concerned in "case. Of the 5 Englishmen, the Additio "Subordinate Judge is a Government "vant, and Government is seeking "recover money lost to it, and is public "secutor as well. The planter is kno "to be hostile to some of the accused. T "Government amlah and the other "Judges are objectionable on the same sc "as the English Judge. The mookh "are not of the class before whom I wo "wish to see such a case as this laid, "to a large proportion of them there wo "be legal objections, say to two-thirds of the "Of the private amlahs, all but one are op "to legal objection. Of the pleaders ma "are legally barred by their engagemen "and those the most intelligent, say tw "thirds of them.

"There remain then the following, again "whom there is no legal objection kno "to me:—

	Native Christian.	Hindoo.	Mahomedan.	Total.
Pleaders	..	10	1	11
Mookhtars	.	9		9
Zemindars	.	17	5	22
Merchants, Bankers, and Agents	1	32	1	34
Editors, Priest, Doctor, Private Amlah	...	5	.	5
	1	73	7	81

"There is, therefore, not a single Europea "to serve on the Jury. There will be great "difficulty also in obtaining from the 81 "persons left a sufficient number of Juror "who know English. It is almost certain "that some of those who do speak Englis "will be open to objection on one side or "the other. The whole of the classes who "habitually speak English have already been "excluded. None of the Mahomedans do "so, and I think it very doubtful whether, "out of the remainder, I could get together "7 men who understand English fairly well "enough to listen to English evidence and "arguments. In a case of this kind, I "think justice requires a Jury which under-"stands English. I cannot rely on the

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"presence in Court of any intelligent English-"speaking person drawn to the trial by any-"thing less than personal interest. I refer to "the latter part of Section 343.

"I am not by any means dissatisfied with "the working of native Juries on the whole, "but the reverse; and if the case were one "of a riot or other offence resting on ver-"nacular evidence, and involving no further "strain on their judgment, I would not "think the fact of the accused being "Armenians sufficient to suggest either pre-"judice or favor at the trial; nor do I think "it would do so in this instance. But "though they would be quite impartial, I "do not think a native Jury of the class "that would have to try this case could be "relied on to keep their balance of judg-"ment in the presence of the difficulties "before them. The Armenians are of a race "which Hindoos do habitually treat as "superior to themselves. The accused in "this case are men of the highest standing "in business. The evidence, all in English, "both oral and documentary, will be of a "kind such as they rarely hear of. The "whole proceedings will be in the English "language (necessarily). The arguments "of English Barristers will be new to them, "and will be pressed on them in a way to "which they are not accustomed. If the "accused be convicted, they would fairly "say that they had been tried by the worst "Jury that the law permitted, whereas I "think the case is one which requires as "able men to try it as the Court can obtain.

"I would, therefore, suggest that the High "Court should call the case on to its own "file. Neither prosecution nor defence will "be put to any serious inconvenience if "this be done, as communication is easy "between here and Calcutta, though only "once a week.

"I have, &c.,

"(Sd.) W. J. HERSCHEL."

Upon this letter being received by the Registrar, it appears to have been laid before the Chief Justice, Sir Barnes Peacock, who recorded upon it the following Minute:—

"It appears to me that the Court ought not "to interfere upon the application of the "Sessions Judge made by letter.

"If Government (or the prosecutor, if "the case is not prosecuted by Government), "or any of the accused, think fit to apply "to the Court by motion supported by "affidavit or affirmation, the Court will decide "what ought to be done.

"*June 16, 1869.* (Sd.) B. PEACOCK."

This view of the learned Chief Justice was concurred in by the Judges of the Court as under:

"I agree with the Chief Justice.

"J. P. NORMAN."

"And I.

"C. HOBHOUSE."
"G. LOCH, *16th June 1869.*"
"H. V. BAYLEY, *16th June 1869.*"

"I agree.

"D. N. MITTER."

"Seen.

"W. MARKBY, *16th June 1869.*"
"E. JACKSON."

And further it was agreed to, as I have already mentioned, by my learned colleague, Mr. Justice Louis Jackson.

This decision having been arrived at in 1869, it appears to us to set the matter at rest, and I think that Mr. Macrae, on the part of Government, will feel that he cannot, with propriety, contest the point further.

(Mr. Macrae assented.)

Jackson, J.—I wish to add a few words by way of explanation of what seems to be an inconsistency on my part. My acquiescence in the course taken on that occasion was in this degree marked that, while the other Judges had merely attached their initials in token of their concurrence, I wrote a separate note, and that note is in these words:—

"I quite agree with the Chief Justice "that such an application could only be "entertained if made in the way stated by "him.

"I take the opportunity of pointing out "that it has been a very common practice "for Sessions Judges to make recommen-"dations for the transfer of cases from one "district to another by letter, and that "cases have often been so removed by a "mere letter based on such recommenda-"tions.

"It may be worth considering whether "some rule ought not to be laid down for "dealing with such applications.

"The same thing also happens in respect "of civil cases."

It would seem, therefore, that I not only concurred in that view, but considered it desirable that the Court should lay down a formal rule which should regulate the procedure in such cases, and should be a notice and a guidance to Judges and Magistrates when they should think fit to make such references in future. Immediately afterwards, I left the country, and was absent for four or five months, during which time no one took any steps in the matter. The result was that no formal rule was made, and this case appears to have passed out of sight. Two years afterwards, I had the honor to succeed to the charge of the English Department, and found that, notwithstanding this case, the practice continued to be such as it had formerly been, and therefore the course I took in this case was in strict conformity to the old practice, which had not been departed from, notwithstanding this case. I do not hesitate to say that the procedure suggested by Sir Barnes Peacock is the proper one, when there are parties concerned, but the practice being such as I have stated, I considered myself justified in making the order which I did.

Garth, C. J. I desire to add that I personally do not regret that this matter has been thoroughly ventilated and discussed in open Court.

It is extremely desirable that the public should fully understand that in this country there is the same law for the Government as for the subject, and that there is not one course of practice for the Crown and another for the prisoner.

Wherever the rights of the subject are concerned, it is quite right that the matter should be dealt with by us in open Court in our judicial capacity, and that each application should be made, supported by affidavit or affirmation, in the regular way.

In the present case, the rule will be made absolute to set aside the order complained of; and the Crown will be at liberty, if so advised, to make a substantive application to the Court for the transfer of the case to some other district.

Macpherson, J.—I concur in thinking that the Crown has shown no good cause against the rule, and that the rule should be made absolute.

Pontifex, J.—I also agree.

Morris, J.—I also agree.

The 28th March 1876.

Present:

The Hon'ble A. G. Macpherson, W. Markb and G. G. Morris, *Judges.*

Section 295, Criminal Procedure Code.

(Miscellaneous Case.)

Mohesh Mistree and another, *Petitioners.*

Baboo Brojo Nath Mitter for the Petitioners.

Where a Magistrate takes up a case under Section 2 of the Criminal Procedure Code, his only proper cou is to proceed under Section 296, and report the case the High Court.

Macpherson, J.—It seems to us to be cle that this case came before the Magistra of the 24-Pergunnahs under Section 295 the Criminal Procedure Code, and that was, in the first instance, dealt with by t Magistrate under that Section. That bei so, his proper and only course was to pr ceed under Section 296 to report the ca for orders to the High Court, which (und Section 297) might have ordered the accus persons to be tried, if of opinion that th had been improperly discharged.

A case (*re* Seddya bin Satya), quoted Mr. Prinsep in his latest edition of t Criminal Procedure Code as having be decided by the Bombay High Court. h been referred to as showing that the Mag trate was right in the course he adopte But that case is not reported in the regu Reports of the Bombay High Court; n have we been able to find any report of The full facts with which the Bombay Co had to deal are not before us, and we a unable to say how far the Court may rea have gone. The note we have of this de sion is, therefore, of little value; and, taki it as it stands, we are not prepared to agr with it as regards cases coming before t Magistrate under Section 295.

Dealing with the matter under Sectio 294 and 297, we think there is material er in the Magistrate's proceeding, and that his order directing the Joint Magistrate to entertain "the fresh complaint now made" and all the subsequent proceedings ought to be quashed.

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hatever may have led to the various rs which have occurred in the prose- n of this case since the 21st of July , there is no doubt that very great and rtunate delays have taken place. It is, rule, unfair and undesirable in every to order an accused person to be tried and over again for the same offence, ss under very peculiar circumstances. the present instance, there is nothing liar in the circumstances to warrant a d trial; and it seems to us wrong and roper (within the meaning of Section) that an order should be made directing prosecution to be now recommenced. The order of the 10th of February and the subsequent proceedings are quashed.

The 3rd April 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Fresh evidence.

(Miscellaneous Case.)

Noor Mahomed and others, *Petitioners.*

Baboo Mohinee Mohun Roy for the Petitioners.

Where a Magistrate was dissatisfied with the opinion pressed by a Deputy Magistrate on the evidence ore him, and remanded the case for fresh evidence one particular point only, the Magistrate acted gally, and made all his subsequent proceedings gal also.

Markby, J.—It seems to us that the esent case is precisely similar to that in W. R., page 47, Criminal Rulings. The agistrate did not, upon any further idence, which was not before the Deputy agistrate when he made his order of dis- arge, receive a fresh complaint against e prisoner; but, being dissatisfied with the inion which the Deputy Magistrate had rmed upon the evidence before him, he manded the case to the Deputy Magistrate take further evidence upon one particular int only, that is, he did the very thing hich this Court, in the case we have eferred to, held that he had no power to o. Following that decision, with which e entirely concur, we are bound to say that he order of the Magistrate was illegal, and hat all the subsequent proceedings were, herefore, illegal also, and the convictions must be set aside.

That being so, the other objection becomes immaterial. We may say, however, that there is no doubt that the first order of the Deputy Magistrate was, as we have just now described it, an order of discharge, and not an order of acquittal.

The 5th April 1876.

Present:

The Hon'ble F. A. Glover and Romesh Chunder Mitter, *Judges.*

Proceedings under Section 523, Criminal Procedure Code—Report of Jury.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Magistrate of the 24-Pergunnahs.

The Queen

versus

Nakori Paroee and another.

Where, under Section 523 of the Criminal Procedure Code, a Magistrate receives the report of a Jury, he is bound to act according to the recommendation of the majority. When a number of Jurors do not agree with one another in every respect, but all agree that a certain order passed by a Magistrate, taken as a whole, is not necessary, such Jurors should be counted together as objecting to the order.

Reference.—I HAVE the honor, under the provisions of Section 296 of the Criminal Procedure Code, to submit for the consideration and orders of the High Court, the papers relating to an order passed by the Deputy Magistrate of Satkhirah on November 10th for the removal of certain obstructions from a channel known as the Kuchiamara Katakhal.

It appears that, on August 23rd, the Deputy Magistrate, under the provisions of Section 521 of the Criminal Procedure Code, issued an order calling upon the appellants Nakori Paroee and Gopal Paroee to remove the obstructions in question, or to appear within a week to show cause why they should not remove them.

The appellants having objected and demanded a Jury, the Deputy Magistrate, on September 9th, referred the matter to a Jury of seven persons, of whom three were nominated by the appellants and four by the Deputy Magistrate, the president being the Sub-Inspector of Police.

The Jury having met and visited the place, the president and two other members, on September 24th, reported that the obstructions in question are a hindrance to traffic, and that they consequently considered the Deputy Magistrate's order to be a reasonable one. Three other members of the Jury distinctly found that there is no obstruction to traffic, and that consequently the Deputy Magistrate's order was unnecessary. The remaining member Shoshee Bhusun Roy reported that he did not consider it necessary that the obstructions in question should be entirely removed, but merely that the passage at present left open should be widened.

On receiving these reports, the Deputy Magistrate determined to refer the matter again to a fresh Jury, and called upon the appellants to nominate three members. The appellants, having objected to the appointment of a fresh Jury, and not having nominated any members, the Deputy Magistrate, on November 10th, passed the order now submitted for the consideration and orders of the High Court.

It appears to me that this order is illegal, because the Deputy Magistrate was bound to accept the finding of the Jury. If, as was apparently the case, no definite finding was implied in the reports furnished by the various members, the Deputy Magistrate should, I think, have called upon them to say definitely whether they considered his order to be reasonable as it stood, or with any modification which they were prepared to recommend. I do not find that he was authorized by any provision in the law to order the appointment of a fresh Jury, or, having done so, to act as if the appellants had, in the first instance, failed to nominate Jurors. A Jury has met, and has not found the original order of the Magistrate to be reasonable and proper, and therefore, as it seems to me, the Deputy Magistrate was not justified in repeating or enforcing the said order.

When the case first came before me, I expressed the opinion that the Deputy Magistrate's order was illegal, but postponed taking any action regarding it, in the hope that the appellants would take such action as might enable the Deputy Magistrate, without neglecting due consideration for the public safety and convenience, to withdraw his order. This, however, has not proved to be the case, and I am, therefore, compelled to submit the case for the consideration of the High Court.

Judgment of the High Court.

Glover, J.—By Section 523, Code of Criminal Procedure, the Deputy Magistrate was bound to be guided by the decision of the Jury, which decision was to be according to the opinion of the majority.

Now, the Jury were seven in number. Three of them considered that there was no obstruction; a fourth that all that was required was a slight widening of the channel, and that there was no necessity for carrying out in its entirety the Deputy Magistrate's order for the removal of the so-called obstruction.

This proposed modification of the Deputy Magistrate's order by the fourth Juryman does not appear to have been accepted (Section 526) by the Deputy Magistrate, so the result was that, to four out of the seven Jurors, the Deputy Magistrate's order did not seem reasonable or proper; and, under such circumstances, we are of opinion that the Deputy Magistrate had no authority to proceed with the enforcement of his original order to remove the obstructions.

The 10th April 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Recall of witnesses—Second cross-examination—Right of accused.

(Miscellaneous Case.)

Nobin Chand Banerjee and another, *Petitioners.*

Baboo Mohinee Mohun Roy for the Petitioners.

In a warrant-case, the accused is entitled to recall and cross-examine prosecution-witnesses, as expressly provided by Section 218, Criminal Procedure Code; and in a case in which this right was refused by the Magistrate, and a good portion of the imprisonment ordered had been suffered, the High Court refused to order a new trial and recorded an order of acquittal.

Markby, J.—In this case, after a complaint had been made and certain witnesses

been examined and cross-examined, arge was drawn up by the Magistrate, r Section 342 of the Indian Penal e. This is what is called a warrant- and the procedure relating to that class ses ought to have been observed.

he charge was drawn up on the 1st ch, and the inquiry was adjourned until 6th. It was again further adjourned the 17th, and finally decided on the On the 3rd March, the prisoners in a formal application, asking that the esses for the prosecution should be lled, in order that they might be cross-mined.

The Magistrate refused that application, the ground that previous to the charge g drawn up, the witnesses had already n cross-examined either by the accused mselves or the vakeels who represented m; and he considered that the accused e not entitled to a second cross-examin-ion.

That refusal was contrary to the express rds of the Code of Criminal Procedure, ction 218, and contrary also to the ing of this Court reported in 17 W. R., 51. The consequence is that both the itioners Brojo Lall Biswas and Nobin and Banerjee have been convicted, and ve suffered imprisonment for 11 days, thout having had that protection which e law has provided for them in cases ere they are put upon their trial.

Under these circumstances, we consider quite impossible that the conviction can supported.

And we also think that, in this case, ought not to direct any further inquiry. he maximum punishment which was arded in this case to the accused Nobin hand Banerjee was 21 days, of which, I have already said, he has suffered days. The other, Brojo Lall Biswas, as only ordered to be imprisoned for days, of which, under these irregular oceedings, he has suffered imprisonment r 11 days.

Under these circumstances, and looking the fact that probably the whole trial ould have to be commenced *de novo*, we ink we ought not to direct further proceed-ngs, but that we ought to order a verdict acquittal to be entered in the case of oth these petitioners.

The 19th April 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Prosecution for false charge.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Magistrate of Beerbhoom.

Ram Runjun Bhandari

versus

Madhub Ghose.

The sanction of a Court to a prosecution for a false charge is necessary when the offence has been committed before such Court, and not otherwise; and a judicial finding of the falsehood of a charge is not indispensible to such a prosecution.

Circular Order No. 19 of 1863 refers only to prosecutions under Section 211, Indian Penal Code.

Reference.—On the 11th February 1876, one Madhub Ghose laid an information in the police-office, charging one Ram Runjun Bhandari with theft. The result of the police-enquiry held thereon showing the charge to be false, the Magistrate of the District, on the 31st March, ordered the charge to be entered in the Crime Register as a false one; on 21st February 1876, the accused person, Ram Runjun, having applied to the Magistrate for permission to prosecute the complainant Madhub for bringing a false charge, permission was, on view of the police-report, in the first instance granted to prosecute under Section 182, Indian Penal Code, which was subsequently, under Section 470, Criminal Procedure Code, amended to Section 211, Indian Penal Code, and the case made over for trial to Deputy Magistrate Baboo Gour Dass Bysack, who dismissed it under Section 147, Code of Criminal Procedure, on the ground that "no sanction can be given for a prosecution of the false complaint, unless or until the complaint has been found judicially to be false." In his explanation, dated 3rd April 1876, submitted herewith, and also in his judgment in the case under notice, the Deputy Magistrate quotes an order of the District Judge in Criminal Appeal Case No. 4 of

1876, which he conceives bars any prosecution under Section 211, Indian Penal Code, prior to a judicial finding on the original complaint, and refers to High Court Circular No. 19 of 21st July 1863, in support of this view.

I consider that the Deputy Magistrate is in error on the following points :—

(*a.*) In basing his dismissal of the charge in this case on the order of the District Judge in Appeal Case No. 4 of 1876, which differed from the case under notice in being a direct prosecution by the Magistrate, on his own motion, under Section 142, Criminal Procedure Code, and in the circumstance that the accused had protested against the proceedings of the police, and sought a trial of his own charge, features absent from this case which has been instituted by the person said to have been falsely accused, and in which no trial has been sought, or protest made, by the accused.

(*b.*) In interpreting High Court Circular No. 19 to rule "that no false charge can be tried without some previous *judicial* enquiry or trial into the original charge," as stated by him in his explanation; the words of the Circular, "such sanction," though it may be accorded "at any time," should not ordinarily be granted until the proceedings based on the complaint have been concluded in favor of the "accused person," distinctly ruling that the sanction may be granted at any time, and making no mention of judicial enquiry or trial.

(*c.*) In making his disinclination to encourage charges of this nature, or his views of their expediency, a ground for dismissing the charge after it had received the sanction of the Magistrate of the District (*vide* the following sentence of his judgment: "I am disinclined to encourage the bringing of charges of false complaints," &c).

As the order of the Deputy Magistrate is, in my opinion, based on an erroneous interpretation of High Court Circular No. 19 of 1863, and is calculated to encourage false complaints, I consider that it should be reversed; but as the following words of Section 468, Act X. of 1872, with reference to complaints of offences under Section 211, Indian Penal Code, "when such offence is committed before or against a Criminal Court," appear to indicate an antecedent *judicial* proceeding of some kind as an essential ingredient of such offence, I beg, at the same time, to solicit the instructions of the Court regarding the procedure to be followed in the prosecution of persons laying false charges before police-officers, w they subsequently neglect or decline to p ceed with in a Court of Justice, the H Court having ruled in the case of R Mohamed *v.* Abbas Khan (8 W. R. R. 67) that false charges laid before po officers are offences falling under Sec 211, Indian Penal Code, not under Sec 182, Indian Penal Code (*vide* also para No. 1155, of the 18th December 1 from Registrar, High Court, Calcutta, R C. R., Vol. I., p. 7).

Judgment of the High Court.

Miller, J.—We agree with the Magist of Beerbhoom, who has made this refere in thinking that the ground upon which Deputy Magistrate, Baboo Gour Dass Br dismissed the complaint in this case u Section 147, Criminal Procedure Code, erroneous in law. The original charge theft brought by the defendant against complainant was not made before a Crimi Court, but a police-officer. Therefore sanction under Section 468 of Act X. 1872 was necessary to entitle the compla ant in this case to prosecute the defend under the provisions of Section 211, Ind Penal Code. Section 468 of the Crimi Procedure Code provides that complaints offences described in it (a charge un Section 211, Penal Code, is one of the offences), when they are "committed befo or against a Civil or Criminal Court," sh not be entertained without the sanctio mentioned in it. This Section does n preclude prosecution of offences referred in it without any such sanction, whenev these offences are committed not "before against a Civil or Criminal Court."

The Deputy Magistrate, in support of th view of the law which he has taken in th case, quotes the Circular Order No. 19 1863 of this Court. The Circular Ord in question is inapplicable to this case, becau it refers to prosecutions under Section 21 Indian Penal Code, when the sanction co templated in Section 468, Criminal Procedur Code, is necessary. We think, therefore, th order of the Deputy Magistrate, dismissing the complaint under Section 147 of the Criminal Procedure Code, is erroneous in law; and, for the reasons given by the Magistrate, we also think that we should set it aside, and direct the Deputy Magistrate to proceed with the investigation of the complaint brought against the defendant under Section 211, Indian Penal Code.

b

The 24th April 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges:*

Proceeding on complaint from a Civil Court.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Bhaugulpore.

The Queen

versus

Thakoor Ram.

Where a Sessions Judge directed a Magistrate to make an enquiry into the matter of some complaints made by a Moonsiff against certain persons, and the Magistrate recorded the opinion that there was evidence enough to incriminate one of the accused, but dismissed the complaint against him, because the complaint made against him had not been explicit: HELD that the Magistrate was wrong to have discharged the accused, and ought to have drawn up a charge against him.

Reference.—THE Magistrate of Bhaugulpore has requested me to refer, for the orders of the Court, an order passed by me under Section 29, Act XI. of 1874, directing him to inquire into certain offences, of which, in his opinion, certain persons were guilty, but regarding which he considered he was incapable of making an inquiry, because the Moonsiff who made the complaint had not specially charged them with these offences.

My order of February 21st lays down what, in my opinion, is the duty of the Magistrate on complaints being made by Civil Courts.

The Moonsiff's complaint was that some of the accused had committed offences under Sections 193, 196, 463, and 471. Other Sections of the Indian Penal Code were also specified as applying to others.

The Magistrate, although he admits that "the evidence is ample to show that Thakoor Ram has committed an offence under Section 206, and perhaps under other Sections of the Code," and though he comes to a finding that, "taking the case generally as it stands, I must record an opinion that the conduct of the accused has been criminal," still discharges them.

It appeared to me that, coming to this finding, he was bound to inquire into the matter, and convict and punish, or else commit the accused with regard to such offences as he found were proved against him.

The Magistrate, in making the reference, seems to think that, though the sanction to prosecute (Section 470, Code of Criminal Procedure) may be general, the complaint under Section 471 must be explicit.

The very circumstances under which it is made would necessarily tend to make it more explicit, but still, the matter being one sent for inquiry, a Magistrate, in dealing with the matter, is no more tied down to any particular charge than he is in any other case which comes before him, but must satisfy himself what offence has been committed, and by whom, and may send to the Sessions or dispose of it himself, according to the nature of the offence he finds proved.

Judgment of the High Court.

Markby, J.—The Magistrate has recorded that the evidence before him was ample to show that Thakoor Ram has committed an offence under Section 206 of the Indian Penal Code, and perhaps under other Sections. Under these circumstances, it was quite wrong to discharge Thakoor Ram, and we can see nothing in the law which required the Magistrate to do so.

Under Section 297, we order a charge to be drawn up against Thakoor Ram upon such Sections of the Penal Code as the Magistrate thinks the evidence will support, and Thakoor Ram will be put upon his trial upon that charge in the manner pointed out in the Procedure Code.

The 25th April 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Custody of minor.

In the matter of

Koolsum Bibee, *Petitioner,*

versus

Sheik Edoo, *Opposite Party.*

Mr. M. Ghose for the Petitioner.

A father having applied to a Criminal Court for the custody of his child, who was eleven years old, and had always lived with the mother, and the Court having caused the child to be delivered up to the father: HELD that the Court was in the wrong, the question being one that ought to be decided in the Civil Court.

Macpherson, J.—IT appears to us that this is a purely civil matter, the question being as to the right to the custody of a minor. It ought to have been dealt with under Act IX. of 1861 by the Civil Court, and the Deputy Magistrate ought not to have interfered. The Deputy Magistrate

really had no jurisdiction to make an order that the child who was eleven years old, and who was (and had for several years been) living with his mother, should be delivered up in Court to the father. The child having been delivered up under that order, and having subsequently found his way back to the mother, we do not see that a criminal charge will lie against her for abducting the child.

The proceedings are quashed. The father may institute such proceedings as he may be advised in the Civil Court under Act IX. of 1861.

The 28th April 1876.

Present:

The Hon'ble W. Ainslie and Romesh Chunder Mitter, *Judges.*

Verdict of guilty—Eye-witness.

Reference to the High Court, under Section 263 of the Code of Criminal Procedure, by the Sessions Judge of Patna.

The Queen

versus

Gokool Kahar, *Prisoner.*

Where a Jury found an accused person guilty of murder, but refused to convict him because there had been no eye-witness of his crime, and on a second charge from the Judge refused to find him guilty at all: HELD by the High Court, to whom the case was referred, that the Judge ought to have explained to the Jury that the testimony of eye-witnesses was not necessary to the establishment of a charge of murder, and that the Jury, if they had no doubt of the guilt of the accused, were bound to give effect to the conclusion at which they had arrived.

Ainslie, J.—THE accused, Gokool Kahar, stands charged with the murder of one Bundhoo Hajjam. The trial was held by the Judge of Patna with the aid of a Jury. At the conclusion of the trial, the Jury, on being called upon to deliver their verdict, returned answer that they found the charge proved by the evidence of the witnesses, but as there were no eye-witnesses of the murder, they could not convict the accused. The Judge records that he requested the Jury to state distinctly whether they found the accused to be guilty or not guilty, and the foreman said that they unanimously found accused to be not guilty. Thereon, the Judge referred the case to this Court under Section 263, Criminal Procedure Code.

On perusing the evidence, we are of opinion that the charge of murder is complete established. We do not act upon the confession of the accused made on February 1876, as it appears to us that object in making the statement then recorded (a statement which, if believed, would make it necessary to pass sentence of death) was to make it appear that he was only acting the instigation of another person. The accused probably thought that this would be taken as a mitigation of his offence.

We think the Judge might properly have explained to the Jury that the law does not require that a charge of murder should be proved by the testimony of one or more eye-witnesses, and that it was for them to determine, without reference to any such supposed rule, whether, on the evidence before them there was any reasonable doubt of the prisoner being the person who caused the death of the accused, and that, if they had no such reasonable doubt, they were bound to give effect to the conclusion at which they had (very properly as it seems to us) arrived in the first instance that the charge was proved.

We convict Gokool Kahar of the charge of murder, and sentence him to be transported for life.

The 2nd May 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt., Chief Justice,* and the Hon'ble C. Pontifex, *Judge.*

Confession before police officer—Irregularity in proceedings—Court of Revision—Evidence irrespective of confession.

Judgment passed on the 10th April 1876, disposing of the question of law in the above case.

The Queen

versus

Hurrybole Chunder Ghose, *Prisoner.*

Messrs. J. P. Kennedy and *T. D. Ingram* for the Crown.

Messrs. W. Jackson and *R. Allen* for the Prisoner.

The provision, that a confession made by a prisoner to a police-officer is inadmissible as evidence against him, applies to confessions made to the higher officers of police, to wit, a Deputy Commissioner of Police in Calcutta.

S. 167 of the Indian Evidence Act applies to crimi

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nal as well as civil cases; and it is for the Court of Sessions to decide whether there is evidence enough, apart from any irregularity, to convict an accused person.

In the case of Queen *v.* Hurrybole Chunder Ghose, HELD that there was evidence enough to convict the accused irrespectively of the confession improperly taken in evidence.

Garth, C.J.—In this case, the prisoner Hurrybole Chunder Ghose was tried and convicted at the February Sessions of the High Court for using certain forged documents, and sentenced to 10 years' transportation.

At the trial before Mr. Justice Macpherson, it was proposed on the part of the prosecution to put in a confession made by the prisoner. The confession was made in the first instance to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police, Mr. Lambert, at the Police Office of Calcutta, where he again affirmed the truth of his former statement to Mr. Lambert. Mr. Lambert, in his capacity of a Magistrate, received and attested the statement.

Upon this confession being tendered in evidence, it was objected to by the prisoner's Counsel, upon the ground that it was a confession made by the prisoner to a police-officer, and therefore not admissible by reason of the 25th Section of the Evidence Act (I. of 1871).

In answer to this objection, it was urged on part of the prosecution:—

1st.—That Mr. Lambert was not a police-officer within the meaning of the Section.

2nd.—That, if he were, the statement was made to him as a Magistrate, and not as a police-officer, and that the 26th Section was intended to qualify the 25th, so as to make a statement even to the police-officer admissible, if made in the presence of a Magistrate.

The learned Judge at the trial admitted the evidence, and declined to reserve the point; but the Advocate-General having since given a certificate under Section 25 of the Letters Patent of the High Court that the point was a proper one to be considered, it has been brought before this Court for review, and has been well and fully argued before us.

It was urged by Mr. Jackson for the prisoner that the terms of Section 25 are imperative; that a confession made to a police-officer *under any circumstances*, is not admissible in evidence against him, and that the 26th Section is not intended to qualify the 25th, but means that no confession made by a prisoner in custody to any person (other than a police-officer) shall be admissible, unless made in the presence of a Magistrate. I am of opinion that this is the true meaning of the 25th Section. Its humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them. It is an enactment to which the Court should give the fullest effect, and I see no sufficient reason for reading the 26th Section so as to qualify the plain meaning of the 25th.

But then comes the question, whether Mr. Lambert was a police-officer within the meaning of Section 25.

It was argued, and with some force, that the term "police-officer" did not mean a Deputy Commissioner of Police; that it comprised only that class of persons who are called in the Bengal Police Act (Act IV. of 1868) "Members of the Police Force," and that the object of the Evidence Act was not to prevent a gentleman in Mr. Lambert's position from taking a confession, but only ordinary members of the Police Force, who are personally and constantly engaged in the detection of crime and the apprehension of offenders.

There is no doubt that, looking at the various Sections of Act IV. of 1868, Bengal Council, the Deputy Commissioner of Police is not a member of the Police Force within the meaning of that Act; and, moreover, on looking back to the Police Act of 1861, it will be found that the term "police-officer," as used in that Act, has generally the same meaning as a "Member of the Police Force" in the Act of 1868; but, in construing the 25th Section of the Evidence Act of 1872, I consider that the term "police-officer" should be read, not in any strict technical sense, but according to its more comprehensive and popular meaning.

In common parlance, and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of police, or in other words "police-officers" quite as much as the more ordinary members of the Force; and although in the case of a gentleman in Mr. Lambert's position there would not be, of course, the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character, and the very place where he sits as Deputy Commissioner, is not without its horrors in the eyes of an accused person; and I think it better in construing a Section, such as the 25th,

which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification.

I am of opinion, therefore, that the confession made by the prisoner in this case ought not to have been admitted at the trial.

But then comes the further very important question, what should be the effect of this improper admission of evidence on the proceedings.

The 167th Section of the Evidence Act provides "that the improper admission of evidence shall not be ground of itself for the reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision," and I was certainly disposed to think, before hearing Mr. Jackson's argument, not only that this Section applied to criminal as well as civil cases, but that the Court which had to determine whether, independently of the evidence objected to, there were sufficient materials to justify a conviction was the Court below, before which the case was originally tried; and upon this assumption my learned colleague and I consulted Mr. Justice Macpherson, who certified that there was ample evidence in the Court below, independently of the admission, to justify the conviction in this case.

Mr. Jackson, however, desired to be heard upon the effect of Section 167, and he has urged upon us—

1st.—That the Section does not apply at all to criminal cases; and

2nd.—That, if it does, the Court to determine whether the conviction ought to stand is not the Court which tried the case, but the Court before whom the point of the admissibility of the evidence was argued.

Mr. Jackson insisted that the word *decision* used in Section 167 was one inapplicable to a criminal case tried on the Original Side of this Court, and that it never could have been intended by the Legislature that a case triable by a Jury, and of the facts of which a Jury alone are the proper Judges, should be virtually retried by any Court, not consisting of a Jury; and in aid of his argument he cited the case of Regina *v.* Nourojee Dada Bhai (IX. Bombay L. R., p. 358).

I am unable, however, to discover any sufficient reason why the 167th Section of the Evidence Act should not apply to criminal as well as civil cases. It is perfectly true that the word *decision* is more generally used as applicable to civil proceedings, but it is by no means inappropriate to criminal cases; and if it was the intention of the Legislature to use an expression which would apply equally to civil as to criminal proceedings, there is probably no other word which would have answered their purpose better. Many other provisions of the Evidence Act apply equally to all judicial inquiries; and if the nature of the mischief which the Section was intended to remedy is considered, there is at least as much reason why it should apply to criminal as to civil proceedings. The Court have no power in a criminal case to order a new trial; and if in each instance, where evidence is improperly admitted or rejected, the conviction is to be quashed, a lamentable failure of justice would often be the consequence.

I am of opinion, therefore, that Section 167 does apply to criminal cases; but upon consideration I think that the Court mentioned in that Section which is to decide upon the sufficiency of the evidence to support the conviction is the *Court of Review*, and *not the Court below*.

The point is certainly *raised*, properly speaking, in the Court below, but it is both *raised* and *argued* in the Court of Appeal; and we think that the proper course of proceeding is for the Court of Appeal to decide upon the case, upon being informed from the Judge's notes, and, if necessary, by the Judge himself of the evidence adduced at the trial.

Apart, however, from the Section 167 of the Evidence Act, I think that, under Section 26 of the Letters Patent, by virtue of which this case has been submitted to us for review, we have a right either to quash or to confirm the conviction as we think proper. The Section enables the Court, after deciding upon the point reserved or certified, to pass such judgment or sentence as it may think right. If, therefore, upon reviewing the whole case, we are of opinion that, upon the evidence properly received, there is sufficient ground to convict the prisoner, we consider that we ought to allow the conviction to stand.

In the present case, therefore, we have obtained copies of the Judge's notes at the trial, and have also obtained further information from the Judge as to what particular portion of the evidence applied to the prisoner, Hurrybole Chunder Ghose, and we are now prepared to hear the case argued upon its

merits, as to whether there is sufficient evidence apart from that improperly admitted to support the conviction.

Pontifex, J.—I also am of opinion that the confession made by the prisoner in Mr. Lambert's presence ought not to have been admitted at the trial.

Without going so far as to say that Section 25 of the Evidence Act renders inadmissible a confession made to any person connected with the police, for there are cases in which a person holding high judicial office has control over, and is the nominal head of the police in his district, I think that in the present case, it was impossible for Mr. Lambert residing in the house allotted to him as Deputy Commissioner of Police, and surrounded by police immediately under his control, to divest himself of his character of a police-officer. I also agree that, under Clause 26 of the Charter, which Clause deals with cases tried before a Jury, we are bound to consider the admissible evidence in this case, and to pass such judgment and sentence as we shall think right, and I come to this conclusion without reference to Section 167 of the Evidence Act.

I agree that such last-mentioned Section is applicable to criminal trials, but I have some doubt whether, if we were proceeding under it alone, we should be the proper Court to consider the sufficiency or insufficiency of the evidence in relation to the verdict.

Judgment passed on the 2nd May 1876 on the facts of the case.

Garth, C. J. (Pontifex, J., concurring).—In this case we have decided that a confession made by the prisoner Hurrybole Chunder Ghose was improperly admitted at the trial. We have now to determine whether there was sufficient evidence against him, apart from that confession, to support the conviction.

The charge against the other prisoner Kessub, upon which he was found guilty, was this, that he used and uttered certain forged documents, with intent to defraud the Government, and the charge upon which Hurrybole was convicted was in substance that he aided Kessub in the commission of this offence.

The case against Kessub was this :—

In the month of November last, Mr. George William Vivian was the Executive Engineer of the Patna Division of the Public Works Department, and Major G. S. Hills was the Executive Engineer of the Bhaugulpore Division. The prisoner Kessub was by occupation a mohurrir, and by means of two forged orders, one in the name of Mr. G. W. Vivian, and the other in the name of Major Hills, he succeeded in obtaining from the Pay Office of the Public Works Department of Calcutta the sum of Rs. 16,854.

The first of these orders is the one which principally concerns the case of the prisoner Hurrybole, and this is the form of it :—

Through Superintending Engineer, N.-W. Circle, Memo. No. $\frac{2652}{A}$

Bankipore, 29th November 1875.

From the Executive Engineer, Patna Division, to the Executive Engineer, First Calcutta Division.

Subject.—Undersigned has the honor to request he will be good enough to pay the sum of Rs. 9,974-11-0 (nine thousand nine hundred and seventy-four and annas eleven only) to Baney Madhub Mundle for wood-works supplied to the division. Information of its being paid must be given to this office in due course.

(Sd.) GEO. WM. VIVIAN,

Ex. Engr.,

Patna Division.

Memo. No. 259.

Dated Dinapore 9th December 1875.

Forwarded to the Superintending Engineer, Presidency Circle, with the request that he will be so good as to direct the Executive Engineer of the 1st Calcutta Division to comply with the wish of the Executive Engineer, Patna Division.

G. A. D. ANLEY, C.E.,

Offg. Supdg. Engr., N.-W. Circle.

That document professed to be an order by Mr. Vivian as the Executive Engineer of the Patna Division, addressed to the Executive Engineer of the Calcutta Division, requesting him to pay Rs. 9,974-11-0 to Baney Madhub Mundle for wood-works supplied to the Patna Division.

In point of fact, no such person existed as Baney Madhub Mundle, nor was there any such claim extant against the Patna works as is mentioned in the order; both

the claim itself and the ostensible claimant were absolute fictions.

Kessub, however, representing himself to be Baney Madhub Mundle, signed the necessary documents in the office of Calcutta in that name, and obtained the money on the 20th December 1875.

On or about the 25th of January, Kessub was arrested, and on the 30th of January 1876, Mr. Younan, who is one of the Superintendents of the Calcutta Police Force, was taken by Kessub to Hurrybole's house at Kidderpore. It is a most important element in the case that Hurrybole was one of the clerks of the Accountant's office in Calcutta, where Kessub succeeded in perpetrating his fraud, and, as such clerk, he would know the course of business at the office, and the forms which were in use there for the purpose of enabling contractors and others employed upon the works to obtain payment.

Upon Younan's entering Hurrybole's house as abovementioned, he told him that he had a warrant to search his premises, and Hurrybole took him upstairs into a room where were some drawers, in one of which was found a paper proved to be in Hurrybole's handwriting in these words:

Memo No.—

Dinapore the—November 1875.

From the Superintending Engineer, Northern Circle, to the Superintending Engineer, Presidency Circle

Subject.

The undersigned has the honor to request the Superintending Engineer, Presidency Circle, to direct the Executive Engineer, 1st Presidency Division, to disburse the sum of Rs. 19,748-13-9, as per detail in margin, to

	Rs.	A.	P.
For Bill No. 73 against Mozufferpore Divn. ...	3,875	5	3
For Bill No. 95 against Patna Division ...	8,945	0	6
For Bill No. 96 against Bhagulpore Divn. ...	6,928	8	0
	19,748	13	9

Baboo Baney Madhub Mundle, Calcutta, for teakwood works and timber supplied. Separate receipts for the sum disbursed on account of separate divisions should be forwarded, and the amount adjusted by transfers to the Division concerned.

This document had all the appearance of a rough draft, alterations had been made on it, several of the words were erased, and in the margin was an account containing the three bills purporting to be for goods supplied to the Public Works Department, the 1st to the Mozufferpore Division; the 2nd to the Patna Division; and the 3rd to the Bhaugulpore Division; the total of the items amounting to the sum which is mentioned in the body of the draft-order.

This is a most important document, and several points in it deserve consideration.

1st.—The same fictitious person is named in it as creditor as is mentioned in the forged order.

2nd.—The same fictitious claim is made in it, though not quite in the same language, nor for the same sum as in the forged order.

3rd.—The name of Mr. Stewart, who was Mr. Vivian's predecessor as Executive Engineer at Bankipore, was at first inserted in the draft and then erased; and

4th.—The sum for which the order is drawn is not imaginary, but it professes to be the aggregate of the three bills which are set out in the margin; all of which, however, are purely fictitious.

Now, unless we are to suppose such an extreme improbability as that the writer of this draft and the writer of the forged order did, without any communication with each other, imagine the same fictitious transaction, and the same fictitious name, about the same time, we cannot help coming to the conclusion that there was some concert between them, and that the contents of the forged order were substantially copied from the draft.

But, assuming this to be so, it is said by the prisoner's Counsel that Hurrybole might very well have written this draft, and shown it to his friend Kessub, or allowed Kessub to copy the contents in perfect innocence; and it has been suggested that, perhaps, Kessub desiring to obtain for his own fraudulent purposes a form of the order used by the office for paying contractors and others, might have made Hurrybole his innocent tool, and obtained the form of order from him upon some pretence without his being at all aware of the purposes to which it was to be applied.

But if Kessub had merely asked Hurrybole for a form of order, the latter would most probably have supplied him with the form itself, without taking the trouble to fill it up with a fictitious name and a fictitious

claim; and most certainly he would never have thought of setting out in the margin a number of items all fictitious, making up the exact sum mentioned in the body of the draft; and even assuming that Hurrybole in perfect innocence, and merely by way of illustration to Kessub, had filled up the form in this way, Kessub would never (if he was minded to use the document for the purpose of defrauding the office) adopt the same name or claim that Hurrybole had inserted. Hurrybole was himself a clerk in the Accountant's office; and Kessub could hardly adopt a surer means of self-detection than to use for his own fraudulent purposes a form which Hurrybole would be sure to recognize.

Looking, therefore, at this draft order alone, it seems very difficult to come to any other conclusion than that Hurrybole prepared it in concert with Kessub, and in aid of Kessub's fraudulent designs.

But then we come to another piece of evidence which, for the purpose of determining the question whether Hurrybole was, in truth, an innocent tool in Kessub's hands, or was himself party and privy to Kessub's fraud, is of the utmost importance.

On the top of the drawers in which the draft-order was found, was a tin-box locked. The Superintendent of Police asked for the key, and Hurrybole produced it from the pocket. On the box being opened, its only contents proved to be two documents, one a promissory note of no consequence, but the other was a letter written in Bengalee, signed with the name of the prisoner Hurrybole, and directed to Kessub. This letter translated is in these terms:—

Sree Sree Krishna, my aid.

Most felicitous one.

Immediately on perusing (this) letter, you will, without a moment's delay, come here, otherwise it will be very bad. What that is cannot be written in the letter. Moreover, you will very carefully put away all the things you took away from here, that is, you will put them by in such a way that no one shall know about them, and then come. When you come here, I shall be free from anxiety.—Finis.

The 2nd Magh 1282 (20th January 1876).

Sree Hurrybole Chunder Ghose.

Destroy the letter after perusing it.

(Superscription.)

To the worthy of good fortune,

Sreejoot Kessub Chunder Mannah Bhaejee,

May fortune attend you.

This letter is to be delivered at the above-named person's house in Station Gurbaliah, *viâ* the Juggutbullubpore Post Office.

Very urgent letter.

It has been strongly argued by the prisoner's Counsel that this letter is not actually proved to be in the prisoner's handwriting, but it is a letter signed in his name, addressed to his friend Kessub, and found carefully locked up in his own box.

Whether, therefore, it is in his handwriting or no, it is undoubtedly his letter written for the purpose of being sent to Kessub, and probably only delayed in consequence of some suspicion existing in his mind as to the safety of its transmission.

Taking it then to be his own letter, what does it mean? It means, in the first place, that there was a common danger impending over himself and Kessub. It means that the danger was of such a serious and secret character that he does not mention it in the letter.

It means, moreover, that the danger was connected with some thing or things which Kessub had taken from Calcutta, or from Hurrybole's house, which things Kessub was to put out of the way or conceal before he came toKidderpore; and, lastly, that Hurrybole himself would not be free from anxiety until Kessub's arrival.

It is evident from this letter that Hurrybole had learnt something which he believed threatened danger to Kessub and himself, and that this danger was connected with something which Kessub had obtained from Hurrybole, which something it was of grave consequence to them both to conceal. At the date of this letter, *viz.*, the 20th January, it must be remembered that Kessub himself was on the point of being apprehended for the offence, of which he was afterwards convicted. Having regard, then, to this fact in connection with the draft-order, and the letter found, in Hurrybole's house, we find it impossible to arrive at any other reasonable conclusion than that Hurrybole was party and privy to Kessub's fraud, and aided him in the uttering and using of the forged order.

We consider, therefore, that there is ample evidence, independently of the confession improperly admitted, to support the charge; and that, consequently, the conviction ought to stand.

We accordingly pass the same sentence upon the prisoner Hurrybole which has already been pronounced by the Court below.

The 3rd May 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ganja sale in excess of license—Responsibility of owner of shop.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Beerbhoom.

The Queen

versus

Sristidhur Shaha.

Where a sale of an excess quantity of ganja took place, and the man effecting the sale pleaded that he was only a servant, while the owner contended that he did not conduct the shop, and gave no authority to his servant to sell ganja in excess of his license: HELD that the owner of the shop was responsible for the offence committed, and liable to the fine which had been imposed on him.

Reference.—INFORMATION was given to the Abkaree Daroga of Soory on the 15th February 1876 by one Shorbeshor Sho, to the effect that a person named Dhonekristo Dutt (servant of the applicant Sristidhur Shaha) had illicitly sold more than the authorized amount of ganja. The Abkaree Daroga proceeded to the spot, apprehended both the vendor and purchaser of the ganja, and forwarded them to the Collector, who made the parties over for trial to the Deputy Magistrate of this district.

In his defence, the accused Dhonekristo admitted that he had sold more ganja than was authorized, but stated that Sristidhur Shaha was the proprietor of the shop, and not he.

On this, the applicant Sristidhur was sent for by the Deputy Magistrate, and questioned. He denied all knowledge of this sale, and stated that he himself never sold any ganja. He said that he employed this Dhonekristo to sell his ganja; that he never gave the man permission to sell a larger quantity than authorized by his license; and that he did not even reside at the shop himself.

The Deputy Magistrate, Baboo Gour Dass Bysack, has convicted the petitioner Sristidhur under Section 44 of Act XXI. of 1856, and sentenced him to pay a fine of Rs. 50.

Dissatisfied with this order, the petitioner comes to this Court under Section 296, Criminal Procedure Code, and asks for a reference.

It appears to me that the order passed by the Deputy Magistrate is contrary to law. I cannot find an iota of evidence to prove complicity on the part of Sristidhur, or anything to show that he was any party to the illicit sale of the ganja. He does not appear to have carried on the business of his shop himself, but to have left it entirely under the management of his servant, who in turn does not attempt to say that he was acting under any order from his master when he committed the offence.

It is impossible, I think, under such circumstances, to hold him guilty under Section 44.

The explanation submitted by the Deputy Magistrate is forwarded herewith. In regard to it, I have only to observe that the difficulties suggested by him are purely hypothetical, and not likely to arise in practice. But even if they could, that fact would not warrant any unauthorized application of law. He entertains, I think, a wrong view of the decision which he quotes from Weekly Reporter, Vol. VIII., p. 4, dated 23rd June 1867, and lastly he is not, I hold, justified in saying that the applicant placed his servant in the shop to screen himself from the consequence of any illegal acts of his own. nor is he right in concluding that there is a word in the applicant's defence which could possibly reflect upon his character or amount to an admission of guilt.

Under these circumstances, I would recommend that the proceedings of the Deputy Magistrate be quashed so far as Sristidhur is concerned, and his fine refunded. Whether or no further steps should be taken against the servant, who is clearly punishable under the view adopted by the High Court in their decision, dated 18th February 1873, to be found in Weekly Reporter, Vol. XIX., p. 34, is a matter upon which the Honorable Court will doubtless decide.

Judgment of the High Court.

Glover, J.—We think that the Deputy Magistrate's order was substantially right, and we shall not interfere with it.

The Act refers to the licensee, and if he is obliged to carry on his business by means of servants, he must be held responsible for their obedience to the law.

The decision in Weekly Reporter, Vol. VIII., page 4, is not in conflict with the order of the Deputy Magistrate. An agent of a licensee may not be allowed to avoid liability, merely because he is a servant, but that is no precedent for removing the responsibility from a license-holder who takes the right to sell spirits or drugs under certain specified restrictions.

b

The 8th May 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Tainted evidence—Prisoners in pari delictu.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of murder.

The Queen

versus

Baijoo Chowdhry and others, *Appellants.*

Baboo Nilmadhub Bose for the Appellants.

Tainted evidence is not made better by being corroborated by other tainted evidence.

The statement of one prisoner cannot be taken as evidence against another prisoner under Section 30 of the Evidence Act, unless the confessing prisoner implicates himself to the full as much as his co-prisoner whom he incriminates.

The rules of evidence cannot be departed from, because there may be a strong moral conviction of guilt.

Glover, J.—In this case, the prisoners Baijoo Chowdhry and Purshun Rai have been sentenced to death for the murder of Jankee Rai Jemadar; the other five, Dookha Rai, Seeboo Rai, Sobraj, Hulkhoree, and Behary to transportation for life.

The deceased was the Jemadar of an Indigo Factory in the village of Mutteanee, and the case for the Crown is that he was killed by the villagers, ryots of the factory, on account of his licentious and oppressive conduct. The Sessions Judge has given the facts in detail, and it is unnecessary to repeat them. I may say in passing, however, that I do not think there is anything that can be dignified with the name of evidence in respect of Jankee Singh's having ever tyrannised over the factory-ryots, or of having been too intimate with their women. If he injured anybody in these respects, it was the proprietors of the village, between whom and the factory there was considerable ill-feeling.

The only direct evidence against the accused (apart from what can be made of their own statements) is the deposition of the woman Alkia. Bhurut, the approver, and his mother have been disbelieved by the Judge, and their evidence not considered. Mussamut Alkia, who seems to be a woman of good looks, and a somewhat indifferent character, was used as a decoy to bring the deceased within the clutches of those who were burning to punish him, and she was present throughout the assault. She was paid for her services with Rs. 4 and a piece of cloth, and her evidence cannot be put higher than that of an accomplice, and, in fact, the Sessions Judge has treated it in this way.

The Judge sums up as follows:—

"Against Baijoo No. 1, there is his dislike "of the deceased as spoken to by Mr. "Crowdy and witness No. 10, the evidence "of Alkia, and the confessions of Purshun "and Seeboo, all of which speak of him as "taking the leading part. There is also "the evidence, slight no doubt, of the "cloth merchant, and of the two witnesses, "4 and 5, who speak to his sudden disappearance from the village where he was at "work the evening of the murder.

"Against Purshun No. 2 we have his own "confession and the mention of him by "Alkia and Seeboo, and the fact that he "was with Baijoo when he purchased the "cloth.

"Against Hulkhoree (6) and Behary (7) "are their own admissions that they were "present when deceased was murdered, and "the mention of their names in the confessions of Purshun and Seeboo.

"Against Dookha (3) and Sobraj (5), "there are the statements of Alkia and the "confessions of Purshun and Seeboo."

The Judge has omitted (evidently through inadvertence) to state the case against Seeboo; but it would be, no doubt, his own confession, the deposition of Alkia and the statements of the other confessing prisoners.

Now, Alkia's evidence, being, as the Judge allows, the evidence of an accomplice, would require corroboration before it could be safely received as against any one of the prisoners. The Judge considers that it has found a general corroboration in the statements of the other prisoners, but this would not be so, except as regards those prisoners themselves. Tainted evidence is not made better by being corroborated by other tainted evidence, and this point has been more than once ruled by decisions of this Court; neither can the statement of one prisoner be taken as evidence against another prisoner under Section 30 of the Evidence Act, unless the parties are admittedly *in pari delictu*, when, that is, the confessing prisoner implicates himself to the full as much as his co-prisoner whom he is criminating. And looking at the evidence against Baijoo in this light, it appears to me insufficient for conviction. Alkia's deposition cannot be held to be corroborated by the statements of Purshun and Seeboo,

and these prisoners do not admit having had any actual hand in the murder, or make themselves out to be equally guilty with Baijoo in which case only could their admissions be "considered" against him.

Nor is the purchase of the cloth anything beyond very indirect corroboration; for the cloth given up by Alkia has not been identified as that purchased by Baijoo. Baijoo may have been on bad terms with the deceased, but neither good nor bad feeling seems to affect cases of this kind much. Purshun, according to the evidence, was Jankee Singh's intimate friend, and yet he took part in murdering him. If the evidence were otherwise strong against Baijoo, Mr. Crowdy's statement might be of importance as indicating a motive for the murder. As it is, it does not seem to me to help the prosecution.

Purshun made three different statements. On the 3rd of December 1875, he said that all the prisoners agreed together to decoy the jemadar into their power by means of the woman Alkia; that the deceased came at night to the *arhur*-field to meet Alkia; and that, as he was talking with her, he was set upon by the others. Purshun added that, although he heard Baijoo give the order to strangle the jemadar, he did not wait to see the act done, but ran off and went to Baijoo's house, where all the prisoners consulted together as to what was best to be done.

Three days afterwards, on the 6th December, Purshun made an entirely different statement, alleging police-interference as his reason for making the first. He then accused a different set of men altogether, Gondur, the father of Alkia, Honuman Singh, and other headmen of the village, of having murdered the jemadar. He mentioned Seeboo as having been sent to fetch the deceased to the *arhur*-field, and said that he was witness to the murder. He accounted for his presence by saying that he was in his own field, which was close to the *arhur*-field. The object of the conspirators was to punish Jankee Singh for his licentious conduct towards Alkia, the daughter of Gondur Singh.

And on the 28th of February 1876, he made a substantially similar statement.

Seeboo's statement cannot, for the reasons above given, be considered as against this prisoner; but his own admissions in his statement of the 3rd of December corroborate Alkia's deposition so far as to Purshun's being present at the time of the murder: and on the whole I think that we must accept the evidence against this prisoner as sufficient.

Seeboo, prisoner No. 4, admitted having made one of the party who were consulting in Baijoo's house how to punish the jemadar. It was agreed that Purshun should bring the deceased on pretence of having an interview with Alkia; that all went to the *arhur*-field with the woman; and that when the deceased came, he was set upon and strangled by all the prisoners save himself. He merely looked on. I think that Alkia's deposition is sufficiently corroborated by this statement, and I would not interfere in the case of Seeboo.

In considering these statements, the medical evidence must not be forgotten. It is to the effect that Jankee Singh was a very robust, powerful man, in good health; and that it would have taken at least six men to murder him in the way he was murdered, *viz.*, strangled between two bamboos.

Against the prisoner Dookha No. 3 and Sobraj No. 5, there is no corroboration of Alkia's deposition. They make no admissions themselves, and Purshun and Seeboo's statements cannot be considered against them, nor can they be held to corroborate the woman's evidence. The prisoners Hulkhoree (6) and Behary (7) admitted having been present when the jemadar was murdered, and their statements, therefore, corroborate Alkia's deposition so far.

The deceased must have been overpowered by a sudden attack by numbers, and as all those present knew that he was to be beaten, and saw him killed before their eyes without the slightest attempt at interference, I think that, even on their own showing, the Sessions Judge's presumption is a fair one that they were aiding and abetting the murder.

I think, therefore, after the best consideration that I have been able to give to this case, that the appeals of the prisoners Purshun, Seeboo, Hulkhoree, and Behary should be dismissed: but I should make no difference in the punishment, and would not, therefore, confirm the sentence of death passed upon Purshun. He will be sentenced to transportation for life.

With regard to the other three prisoners, Baijoo, Dookha, and Sobraj, the evidence, I think, falls short of what is required.

It is a grievous thing, no doubt, that there should be (if such there be in this case) a failure of justice as regards Baijoo especially, whom the Judge con-

siders the principal offender; but the rules of evidence cannot be departed from, merely because there may be a moral conviction of guilt. As the case stands against these three prisoners, there is no evidence which could be reasonably or safely admitted; and although it might not be illegal to convict them on the unsupported testimony of the woman Alkia, I should be sorry to take part in such conviction.

I am of opinion that the appeals of these three prisoners must be allowed, and that they should be acquitted and released.

Kemp, J.—I concur.

The 9th May 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Crime committed on a journey.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Additional Sessions Judge of Chittagong.

The Queen

versus

Abdul Ali and others.

A box containing money having been missed during a halt at Sumbhoogunge, from a boat which was on the way to Chittagong, and a question having been raised whether the charge of theft which was based on the loss should be tried at Tipperah or Chittagong: HELD that the journey was not broken by the halt, and that, under Section 67, Criminal Procedure Code, the case could be tried at Chittagong.

Reference.—THE facts are that complainant and prisoners are people of this place. They were coming in a boat to Chittagong, prisoners being the servants of the complainant. One Sunday, in the middle of the day, he went ashore at a place called Sumbhoogunge, in the jurisdiction of the Thanna of Daoodkandi in Tipperah, leaving the prisoners in the boat, and when he came back, he found a box and 350 rupees missing. He taxed prisoners with it, and was going to the thanna when they gave him the agreement marked A, consenting to submit the matter to arbitration when they came to Chittagong. This instrument was executed at Daoodkandi, the day after the theft. He did not, therefore, proceed criminally against them; they all came on together to Chittagong, where they refused to go on with the arbitration. Complainant charged them with theft before the Joint Magistrate, who has convicted them under Section 380, and sentenced them each to six months' imprisonment and 50 rupees fine. The only evidence against them is the complainant's own statement and the admissions made by themselves in the agreement abovementioned, which is to the effect that complainant went ashore at noon, leaving the six of them in the boat, and after which the box and 350 rupees were missing, and that, with regard to this, they would abide by the decision of arbitration on their return to Chittagong.

They now say they were compelled to give the agreement, and that they did not steal the money.

The theft, if there was one, clearly took place in Tipperah, and the voyage was suspended at the time, so that the offence can hardly be said to have occurred on a journey or voyage within the meaning of Illustration *a* of Section 67, Criminal Procedure Code, the words of which must be construed strictly, 21, W. R. 66.

The objection is not, in my opinion, a merely technical one, for it is clear that both parties have been prejudiced by the fact of the trial being held here. Had it taken place at Daoodkandi, there might have been a police-investigation, and complainant might have found evidence in support of his statement, while the prisoners would have had an opportunity of having their plea in regard to the agreement, which is one of the chief pieces of evidence against them, substantiated. I think the prisoners should have been tried in Tipperah and not Chittagong, and I would, therefore, recommend that the conviction be set aside and a new trial ordered, if the High Court think fit, before the proper Court. I am in doubt whether, under Section 284, I have the power to make such an order myself, and I have, therefore, made this reference.

Judgment of the High Court.

Glover, J.—We do not see how the journey to Chittagong can be said to have been suspended by the short stoppage apparently of a few hours only at Sumbhoogunge. The thefts, therefore, if committed, took place during the journey, and Illustration *a*, Section 67, Criminal Procedure Code, would apply.

We do not, therefore, see any ground for the Court's interference, and the papers will be returned to the Judge.

The 12th May 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mischief—Unsupported claim to land.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Nuddea.

Sonai Sardar

versus

Bukhtar Sardar.

A person commits mischief if he cuts trees on land which he claims, but of which possession, after an execution-sale, has been legally made over to another person, without any objection or formal intervention on his part.

Reference.—UNDER Section 296 of Act X. of 1872, and Circular Order of the High Court, dated 15th July 1863, No. 18, I herewith transmit record of the case noted in the margin, together with the Assistant Magistrate's explanation, to be laid before the High Court with the following report, in order to the quashing of the Assistant Magistrate's order.

Sonai Sardar *versus* Bukhtar Sardar.

Prosecutor complained that defendant had cut bamboos on a piece of land acquired by his employer by purchase at sale in execution of a decree. Defendant, in another statement, denied that the land had ever belonged to the person against whom prosecutor's employer had got a decree, and prayed that proofs as to his (defendant's) possession might be called for. He admitted cutting the bamboos.

The Assistant Magistrate did not consider the defendant guilty of theft, but punished him for mischief.

A ruling of the High Court to be found at page 38 of the 21st Volume of the Weekly Reporter, shows that an offence of this kind is not mischief, and there are various High Court Rulings to the effect that a person, acting under a claim of right, is not guilty of theft in asserting that right I am of opinion that the sentence of the Assistant Magistrate should be quashed.

Judgment of the High Court.

Glover, J.—The case quoted by the Judge is not before us, and we do not know what the facts were; but it is quite impossible that we should have concurred in all that the referring officer said about the legal definition of mischief. There were doubtless other reasons which made us think that the Deputy Magistrate's order was wrong.

For we have no doubt that, where a person whose land (as he says) is given possession of to another under a sale in execution by the Civil Court, and who, at the time of attachment, made no objection, as he might have done under Section 246, Civil Procedure Code, and who since has taken no legal steps to enforce his alleged right does, if he enters upon the land, possession of which has been formally made over to the execution-purchaser, and cuts down the bamboos growing upon it, commit the offence of mischief.

We see no reason to interfere with the order of the Assistant Magistrate, and direct that the papers be returned to the Judge.

The 19th May 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Particulars of time and place in a charge.

The Queen

versus

Udit Singh and others, *Appellants.*

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge of intentionally giving false evidence.

Mr. R. E. Twidale for Appellants.

In a case in which the charge did not contain such particulars as to time and place as were reasonably sufficient to give notice to the accused of the matter with which he was charged, the accused was acquitted by the High Court.

Kemp, J.—THE prisoners in this case, Udit Singh, Deonath Singh, and Gunga Bishen, have been convicted by the Additional Sessions Judge of Gya of giving false evidence. The first objection taken in the grounds of appeal is as to the form of the charge, which the prisoners, we think, properly objected to as being vague and indefinite. Under Section 440 of the Code of Criminal Procedure, the charge ought to contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give notice to the accused person of the matter with which he is

charged. And Schedule III., attached to the Code, gives the form of the charge under Section 193.

Now, in this case, the particular words, alleged on the part of the prosecution, are not set out in the charge. But the whole of the deposition appears to have been bodily entered into the charge. With reference to the merits of the case, it appears that the Moulvie, who, as the Sessions Judge has found, and no doubt correctly found, is a man not likely to state what is false, was dunned by the Maharajah for rent. Certain parties, Rampershad and others, appear to have visited the Moulvie, calling upon him to pay the rent. The Moulvie seems to have been very much annoyed at the conduct of the Rajah. With that case we have nothing to do.

The case before us is that Udit Singh and others knowingly gave false evidence, when they said that, at a certain time of the day, which they fixed as one *prohur*, they had a conversation with Rampershad and Ramphul in the lower verandah of the Moulvie's house Now, seeing that the Moulvie himself admits that he cannot see into the lower verandah of the house from the room upstairs where he was when he wrote a letter to the police invoking their assistance; and when it is also admitted that the Moulvie was employed for a time in writing a letter to the police, there is nothing impossible or improbable in the view that Udit Singh and others should have had the conversation which they alleged they had. We therefore acquit them of the offence of intentionally giving false evidence.

The 25th May 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Theft and receiving stolen property—Second trial after acquittal.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Additional Sessions Judge of Chittagong.

The Queen

versus

Nyaz Ali.

Although a person who is convicted of theft cannot, in respect of the same property, be convicted at the same time of receiving stolen property, yet a person who is acquitted of the theft of any property, or who is not charged with stealing it, may, in respect of the identical property, be charged with, and convicted of, receiving it, knowing it to be stolen; so that the mere fact of a person's having once been acquitted of the charge of stealing any property does not of itself prevent his trial at any future time on the charge of receiving the same property, knowing it to be stolen.

Reference.—NYAZ ALI was tried by the Joint Magistrate of this District on a charge formally drawn up under Section 380 of the Penal Code, and acquitted of that charge on the 20th January last. He has now been committed to this Court on a charge under Section 411, the property which he is charged with dishonestly retaining forming a part of that which he was originally charged with stealing under Section 380. Since the trial before the Joint Magistrate, a sum of money said to be part of the proceeds of the theft was found in his house.

It seems to me that accused is not liable to be tried again. The acts of stealing and receiving or retaining the stolen property, when committed by one and the same person, do not seem to be separate and distinct acts constituting separate offences which can be separately tried or punished.

The concluding portion of the first para. of Section 460 of the Criminal Procedure Code appears to apply, and, in my opinion, protects the accused Nyaz Ali. The second para. of that Section does not apply, because separate charges under Sections 380 and 411 could not have been made against accused under para. 1 of Section 454, as will, I think, be evident on reading that Section and the Illustrations to it. The third and fourth paras. have clearly no bearing on the case.

I had some doubt whether I should not allow the case against accused to proceed as far as the stage indicated in Section 251, but on consideration it seemed to be a waste of time to do so, and I am obliged to trouble the Court with this reference, because I do not believe that I have the power, except in the way indicated in the above Section, to put an end to the case, otherwise than by getting the commitment quashed by the High Court, the only authority competent to do so.

Judgment of the High Court.

Glover, J.—Nyaz Ali was charged with theft under Section 380, Penal Code, and

acquitted by the Joint Magistrate. Since his acquittal, fresh evidence is said to have been obtained as to his being found in possession of a part of the property said to have been stolen, and the Magistrate has committed Nyaz Ali to the Sessions to take his trial for an offence under Section 411, Penal Code.

The Sessions Judge, being of opinion that theft and the receiving or retaining of the stolen property, when committed by one and the same person, are not separate and distinct offences for which that person could be separately tried or punished, considers the commitment to the Sessions of Nyaz Ali illegal, and requests this Court to annul it.

We see no reason to interfere in this matter. When a person is convicted of a theft, it would not be proper to convict him also of being knowingly in possession of stolen property, the offences being, under the circumstances, one and the same, and the possession of the property, knowing it to be stolen, immediately after the theft, affording a sufficient legal presumption that the receiver was also the thief. But it by no means follows that, because an accused person charged with both theft and receiving is acquitted of the first offence, he should be free from all liability to answer the second. As a matter of fact, convictions on the charge of receiving are had every day when the charge of theft on which the accused has also been tried has failed, and if a separate charge of receiving may legally be made against a person charged with theft at the original trial, the second para. of Section 460, Code of Criminal Procedure, would apply, and Nyaz Ali could properly have been committed by the Magistrate. The difficulty would be in proving that the property in question was "stolen property;" but there would be, as it seems to us, nothing to prevent the charge being made.

Of course, this view is dependent on its being assumed that, at the former trial, the accused could not have been convicted of receiving, and could not, therefore, have been properly tried on that charge, there being no evidence in support of it. If, on the present trial, Nyaz Ali could show that he might and ought to have been tried on the charge under Section 411 as well as on that under Section 380 on the first occasion, he might, on the present commitment, be possibly able to plead "*autrefois acquit;*" but this is a matter for the Judge to consider when the trial comes on.

The 25th May 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Recall and examination of prosecution witnesses—Waiver of right to recall witnesses.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Patna.

The Queen

versus

Ram Kishan Halwai and others, *Prisoners.*

Baboo Bama Churn Banerjee for the Prisoners.

Baboo Juggodanund Mookerjee, the Junior Government Pleader, for the Crown.

Where certain accused persons, who were convicted of using criminal force, had not been allowed to recall and cross-examine the witnesses for the prosecution, because the trying officer believed that such witnesses could only be recalled immediately after the framing of the charge: HELD that accused persons always had a right to recall prosecution-witnesses, which ceased only when they themselves waived it; that Magistrates could waive all inconvenience to witnesses by asking accused persons, on the drawing up of charges, whether they required the further attendance of the witnesses; and that the conviction must be set aside, because the accused had not enjoyed the protection provided by the law.

Markby, J.—IN this case, seven persons have been convicted by the Assistant Magistrate of Patna of using criminal force, under Section 353 of the Indian Penal Code, and some of them have been sentenced to two months' imprisonment and fine, some to one month's imprisonment and fine, and some to one month's imprisonment without fine. They all appealed to the Sessions Judge; but it would appear that the cases of the two prisoners, at any rate, namely, those of Kanhye and Behari, were not appealable. The Sessions Judge upon that appears to have referred all the cases to us. But we have only power to deal with those whose cases are not appealable, namely, those of the prisoners Kanhye and Behari.

Now, the facts are, that, on the 18th of March, after the evidence of the witnesses had been taken, a charge was drawn up against these and the other prisoners. The case was then adjourned until the 24th. On the 20th, a petition was presented on the part of the prisoners, praying that the witnesses for the prosecution should be recalled, with

a view to their cross-examination. The order passed upon that by the Assistant Magistrate was, that he would not recall the witnesses for the prosecution, as they had been cross-examined for the accused on the first occasion. He also expressed his opinion that to do so would be to harass them unnecessarily, and further that the accused could not now claim to have these witnesses recalled as of right, because they had not done so in answer to the charge.

Now, it appears from the observations made by the Assistant Magistrate in his explanation sent up to the Sessions Judge, with reference to this case, that he has not had access to the decisions of this Court. Had this been otherwise, it seems to me impossible, after the decisions which had been given in 17 W. R., p. 51, and 22 W. R., p. 44, that he could have dealt with the application of the 20th in the way that he has done. The case is quite clear upon the law and upon the decisions, that the accused can have the witnesses for the prosecution recalled for the purpose of cross-examining them, and that this as a matter of right, and not a matter within the discretion of the Court. And the only question can be whether the accused have waived that right.

The decision in 17 W. R. clearly lays down that, merely because the accused have cross-examined the witnesses prior to the charge, it cannot be said that they have waived their right. That, therefore, entirely displaces the first ground given by the Assistant Magistrate in this case for not recalling the witnesses.

The other ground given by the Assistant Magistrate amounts to this, that the accused, if they desired to exercise this right of recalling the witnesses, were bound to do so immediately after the charge was drawn up; and if they did not do so then, they had no longer a right to have those witnesses recalled. The decision in 22 W. R. is perfectly clear and distinct, that no such rigid rule has been laid down by the law. Mr. Justice Phear says: "In my judgment, the Legislature has not made it a rigid rule that the only time at which the accused person can ask for the recall of the witnesses for the prosecution is the time when he is called upon to enter upon his defence."

Mr. Justice Morris is somewhat less positive, but he also says: "That the law does not lay down any hard-and-fast rule on the subject. The accused has, after the charge has been drawn up against him, an undoubted right to recall and cross-examine the witnesses for the prosecution, and that right remains, unless he himself chooses to waive it."

And the only question really before us now is whether we agree with those decisions. The argument on the part of the prosecution has in substance been that those decisions were wrong. But, after hearing that argument, we desire to express our opinion that we entirely and fully agree with those decisions.

The Assistant Magistrate has made some strong observations upon the inconvenience which will result if the accused persons are allowed to recall the witnesses at any stage of the case. And the Sessions Judge says: "I entirely concur in the Assistant Magistrate's remarks as to the inconvenience of recalling witnesses for the prosecution." If the very clear statement of the law given by Mr. Justice Phear in the case I have just referred to be examined, it is plain that it is the fault of the Magistrates themselves, if any such inconvenience occurs. There can be no doubt that the proper and convenient time for cross-examining the witnesses for the prosecution is immediately after the charge has been drawn up. That course is both consistent with the administration of justice as regards the prisoner and with the interests of the witnesses, who, of course, desire to be discharged. And there is nothing whatever in the law, as explained by this Court, to prevent the Magistrate from taking care that this cross-examination shall take place at that time. But the error which the Magistrate in this case committed is this, that, without inquiring from the prisoners whether they would require the further attendance of the witnesses for the prosecution, he took upon himself to discharge those witnesses, and to send them to their homes. The fault, therefore, lies not with the accused or with those who defend them, if there is any inconvenience, but with the Magistrate himself. This is all clearly shown by the judgment that we have referred to. If the course there pointed out be followed, then, as far as we can see, there is no necessity whatever that any inconvenience should arise.

But unfortunately, although it is quite clear, after the observations we have now made, that these convictions cannot be allowed to stand, these two prisoners have suffered the entire punishment awarded to them, and we cannot help making the same observation which we made the other day in a similar case—the result is that the prisoners have

been convicted, and have suffered imprisonment, without having had that protection which the law has provided for them. And such a result must always be a matter of very deep regret. All that we can do now in justice to the prisoners is to say that they have not been convicted in accordance with law, and that the conviction against them must be quashed.

The cases of the other prisoners which are appealable will be disposed of by the Sessions Judge.

The 30th May 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Breach of the peace—Personal recognizances—Terms of requisition—Evidence of breach of peace.

(Miscellaneous Case.)

Abdool Bari and others, *Petitioners.*

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Petitioners.

Where information of a probable breach of the peace is first laid in general terms, and is subsequently supported by evidence, which is given in the presence of the persons who are particularly implicated by it, the case for a demand for recognizances may properly rest on the whole evidence taken in the case; but when a Magistrate calls upon persons to show cause why they should not be bound down in their own recognizances to keep the peace, he cannot go beyond the requisition, and on the adjudication of the matter order them to furnish other securities besides.

Glover, J.—THE Deputy Magistrate has gone at great length into the supposed rights of the parties in this case, and has given a very decided opinion, that the persons whom he has bound down to keep the peace have no title to possession. It was quite unnecessary for the Deputy Magistrate thus to take upon himself the functions of the Civil Court, and very unwise in him to give color to the objection that he had imported his own private knowledge into the case, and had not adjudicated on the evidence before him.

The first objection taken by the petitioners is untenable. They were present in Court having been brought up on warrants, and in accordance with the explanation to Section 492, Criminal Procedure Code, no summons was necessary.

The second objection must be allowed. The petitioners were called on to show cause why they should not be bound down in their own recognizances (mochulka) to keep the peace; but, on their failing to show cause, the Deputy Magistrate not only ordered them to give their own recognizances, but also to find two securities (jaminee) apiece to a large amount. Section 492 lays down the procedure to be adopted in cases like the present, and it has been ruled by this Court that its provisions are imperative, and to be strictly carried out. Now, no demand was made upon the petitioners to furnish securities, the number of sureties required was not set forth, nor the amount in which they were to be bound. All the petitioners were called upon to give, or to show cause why they should not give, was a personal recognizance, and the Deputy Magistrate's order could not legally go beyond such an adjudication. The petitioners had no opportunity given them to show cause why they should not be ordered to give sureties. And the order compelling them to furnish them was not according to law.

Then it is objected, on behalf of the petitioners, that a portion of the evidence was taken by the Deputy Magistrate behind their backs, and that none of it, whenever taken, fixes the petitioners with special liability, or proves that there was any likelihood of their committing a breach of the peace.

The evidence (that of the Sub-Inspector of Police and Constables) which the petitioners complain was taken behind their backs on the 25th of January 1876, was supplemented by re-examination of the same witnesses in the presence of the petitioners on the 21st of March following. The petitioners have, therefore, nothing to complain of in this respect; the question is whether that evidence, together with other depositions taken at the same time, fixes Abdool Bari, Azhur Ahmed, and Cherag Ali, with the intention to commit a breach of the peace.

In the January depositions their names are not mentioned (save that the Inspector Amir Ali speaks of men as having been sent by Abdool Bari, a circumstance which he knew only from hearsay). The probable

combatants are stated to be Hurmut Ali on the one side and Abdool Summud on the other.

On re-examination, the Head-Constable Deokeenundun said that the petitioners were Abdool Summud's men, and that they "often remained about and commit breach of the peace," and he also said "that these very men caused recently a serious riot in the village."

The Sub-Inspector Gulzai Chand swore that the petitioners "are foremost in committing breach of the peace, engaging in unlawful assemblies, and retaining possession by force," and that he had seen these men at Bheni "in connection with the cases instituted on both sides." He added that "both parties were ready to fight."

Now, this was evidence taken in the presence of the petitioners, and which they had the opportunity of testing by cross-examination. It does not specify any particular act of violence which the petitioners were about to commit, but it distinctly proves a likelihood of there being a breach of the peace consequent on the disputed succession of Mahomed Hyat, and points to the petitioners who were strong partizans of one of the contending parties, Abdool Summud, and themselves also interested, as the persons likely to take part in committing that breach. The words of Section 491 are that, whenever "a Magistrate receives information that any person is likely to commit a breach of the peace, he may summon such person," &c., &c. Now, the evidence of the Sub-Inspector and Constable was given distinctly to the point that the petitioners were likely to commit a breach of the peace, and there was an adjudication on the point after hearing evidence for the defence, and many witnesses were examined on that behalf in the presence of the petitioners.

It appears to me, therefore, that, except as regards the demand for sureties, the order of the Deputy Magistrate in respect of Abdool Bari, Azhur Ahmed, and Cherag Ali, was legal, and that, with this modification, it ought to be upheld.

The petitioner Abdool Summud objects to the Deputy Magistrate's order, first, on the ground that the summons was not in legal form according to Section 492. This may be taken in conjunction with the objection in the 3rd para. Of his petition to this Court, which is the same as that already put forward by Abdool Bari and his companions, and which must be allowed for the reasons given in our judgment on their application. The Deputy Magistrate was not justified in calling upon Abdool Summud to furnish sureties, when the summons or requisition to show cause did not mention the requisition, and when none of the provisions of Section 492 were complied with.

But with the substantive order calling upon Abdool Summud to give his personal recognizances to keep the peace, we do not think it necessary to interfere. There was evidence, the evidence of the police-officials, on which the Deputy Magistrate would have been justified in finding that there was a likelihood that Abdool Summud, in company with the defendants, would commit a breach of the peace, and the private knowledge which the Deputy Magistrate is said to have imported into the case had nothing to do with his believing the perfectly clear and straightforward testimony given by the Sub-Inspector and Constable.

Save, therefore, as regards the call for sureties, which portion of the order is set aside, the Deputy Magistrate's decision must be upheld.

There is another matter, however, connected with this case, in which we ought, we think, to interfere under Section 297. Whatever may be the rights of the parties to the estate left by Mahomed Hyat, there can be no doubt on the evidence that both sides are equally ready to fight, and that a riot was and is just as likely to take place in consequence of Hurmut Ali's proceedings as of his opponents. The Deputy Magistrate himself admits that Hurmut Ali has already been obliged to use force in order to hold his own. And there can be little doubt that he has been discharged from his summons calling upon him also to show cause why he should not be bound down, because of the very decided opinion which the Deputy Magistrate has recorded as to the rights of the parties. It seems to us that, under the circumstances and in the face of difficulties which admittedly exist, it is just as necessary to call upon Hurmut Ali to furnish security (his personal recognizance that is), as it was to call on the other side to do so, and we direct that Hurmut Ali be again called upon by summons to show cause why he should not give a personal recognizance to the same amount as that given by Abdool Bari and the other petitioners.

The Magistrate of Patna will be requested to make the enquiry, and to submit the result of it to this Court.

C.

The 10th June 1876.

Present:

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Powers of Magistrates—Summary jurisdiction—"Transfer" of Magistrates—Effect of furlough on powers.

(Miscellaneous Case.)

Pursooram Borooah, *Petitioner.*

Baboo Krishna Komul Bhuttacharjee for the Petitioner.

Baboo Juggodanund Mookerjee for the Crown.

Where an Assistant Commissioner in a non-regulation district, who had been vested with first-class powers and with summary jurisdiction in one place, had gone on furlough, and on his return been posted to another place, and there vested with only first-class powers, and it was doubtful whether the second appointment could be treated as a "transfer" from the first, so as to save all the authority originally vested in the officer under Section 56 of the Code of Criminal Procedure: HELD by the High Court that the Assistant Commissioner did not possess summary powers in his second charge, and that a conviction resulting from the exercise by him of such powers must be quashed.

Markby, J.—IN this case an important question is raised as to the powers of a Magistrate in the province of Assam.

It appears that one Pursooram was, in December last, tried summarily, and convicted by Mr. Carnegy for the offence of giving false information to a public servant.

A reference was made upon the subject to this Court by the Judicial Commissioner of Assam upon other points than those now before us, and this Court, upon that reference, refused to interfere.

A petition was then presented on the 5th April, on behalf of the prisoner, praying that the conviction and sentence be set aside upon the ground that Mr. Carnegy had not the power to try the prisoner summarily.

The circumstances of the case, so far as they bear upon the power of Mr. Carnegy to try this prisoner summarily, appear to be these:—

Mr. Carnegy, in the year 1872, held the office of Assistant Commissioner in the District of Assam, which was then what is called a non-regulation district, under the Local Government of Bengal. On the 1st of January 1873, a Resolution of the Local Government of Bengal was published in the *Calcutta Gazette*, by which it was directed, under the provisions of the Code of Criminal Procedure, that the officers and others whose names appeared in the Schedule therewith published should in each case exercise the powers shown opposite their names in the districts shown in the Schedule. In the Schedule we find under the heading "Seebsaugor District" the name of Mr. Carnegy, and opposite his name are the words: "Charge of Jorehaut Division with first-class powers and powers under Section 222." This latter Section is the one which relates to summary trials.

No earlier *Gazette* on appointment of Mr. Carnegy has been produced before us, but I think this is sufficient evidence that Mr. Carnegy was the Magistrate of the Jorehaut Division of the District of Seebsaugor (see Section 28 of the Code of Criminal Procedure) at that time, and had the power to try offences summarily in that district.

On the 6th February 1874, certain territories, including the Districts of Seebsaugor and Kamroop, were removed from the government of the Lieutenant-Governor of Bengal, and placed under a Chief Commissioner. In April 1874, Mr. Carnegy, having obtained furlough on medical certificate from the Government of India for one year, left India shortly afterwards. Several officers in succession were appointed, whilst Mr. Carnegy was absent, to take charge of Jorehaut Sub-division.

In the month of September 1875, Mr. Carnegy, having obtained leave from the Secretary of State to return to duty, arrived in India. He never returned to the District of Seebsaugor, nor up to this time has he resigned or vacated his office as Magistrate in that district, otherwise than he may have done so by reason of the circumstances above mentioned.

On the 25th of September, there appeared

a notification in the *Assam Gazette*, that Mr. Carnegy, Assistant Commissioner, was "posted" to the District of Kamroop, and on the same day there appeared a further notice in this *Gazette*, that Mr. Carnegy was vested with the powers of a Magistrate of the first-class.

Upon these facts, it seemed to us, when the matter was before us on a former occasion, that Mr. Carnegy had no power to try prisoners summarily in the District of Kamroop. The exercise of those powers was originally limited to the District of Seebsaugor, and when Mr. Carnegy was posted to Kamroop (whatever that may mean), whilst, on the one hand, he was expressly authorized to exercise the powers of a First-class Magistrate in the District of Kamroop, the remaining power which had been formerly conferred upon him of trying prisoners summarily was not re-granted.

It was at this juncture that we released the prisoner upon bail; but we abstained from quashing the conviction, because, the matter being one which affected the jurisdiction of a judicial officer, and possibly of many judicial officers, we thought the Local Government ought to be represented.

Baboo Juggodanund Mookerjee has now appeared for the Local Government. He has not given us any additional information, but he relies entirely upon the provisions of Section 56 of the Code of Criminal Procedure, by virtue of which he contends that all the powers conferred upon Mr. Carnegy in Seebsaugor are extended to Kamroop.

That Section provides as follows: "Whenever any person holding an office in the "service of Government, who has been invested with any powers under this Act "or any enactment hereby repealed, in any "district, is transferred to an equal or higher "office of the same nature within another "district, he shall, unless the Local Government otherwise direct, continue to exercise the same powers in the district to "which he is so transferred."

Upon this Section two questions have been raised:—

1. Was Mr. Carnegy "transferred" within the meaning of the Section?

2. Is the operation of the Section prevented, because the Local Government has "otherwise directed?"

Neither of these questions is free from difficulty. With regard to the first, it is said that, by going on furlough, Mr. Carnegy vacated his former appointment, and could not, therefore, on his return, be transferred; that no order transferring him has been made, and that the term "posted" indicates, not a transfer, but a fresh appointment. But that word is ambiguous, and, before deciding the question upon this ground, it would be necessary to see whether Mr. Carnegy ever really vacated his former appointment. Upon this matter there is, as far as I am aware of, no rule laid down by authority. Prior to 1868, it was, I believe, always understood that any officer going on furlough vacated his appointment, and, under an order of the Government of India of the 16th December 1861, it is expressly declared that "Civil Servants taking furlough will vacate their offices." Mr. Carnegy was not a covenanted Civil Servant, and to what furlough rules he may have been subject prior to 1868 I am not quite sure; but I believe the rule that officers going on furlough vacated their appointments was universal. On the 16th June 1868, however, an order was published, which directs that, except as hereinafter provided, "an officer, when on furlough, shall retain lien on his substantive appointment or on an appointment of similar character, and not less salary." This is applicable to all officers, whether covenanted or uncovenanted. It seems to me extremely doubtful whether the effect of this last rule is that the officer taking furlough retains his appointment. To my mind it rather indicates the contrary. The matter, however, may not depend entirely upon these rules, which are furlough-rules only issued by Government in the Financial Department. It may be that what really vacates an office is not the going on furlough, but the appointment of another person to the office, and, as far as I have seen, no person was specially appointed to succeed Mr. Carnegy in his office as Magistrate in the District of Seebsaugor. The number of Subordinate Magistrates in a district being unlimited, there was no necessity for doing so. And this seems to be the view of the Local Government of Assam; for, whilst Mr. Carnegy's powers were conferred afresh, it does not appear that he ever received any fresh appointment as Magistrate. He is, no doubt, treated as having ceased to be Magistrate of a Division of a District, but he is apparently treated as being still, on his return, a Subordinate Magistrate in or of a district, which district could have been no other than the District of Seebsaugor.

I should, therefore, desire further consideration before holding that Mr. Carnegy vacated his former appointment by going on furlough, and that, on this ground, he was

not transferred to the District of Kamroop within the meaning of Section 56. I desire to be understood as expressing no opinion upon this point.

But there remains the second question, whether the operation of the Section is prevented, because the Local Government has otherwise directed.

If we take Section 56 quite literally, it would seem to indicate that the "direction otherwise" there alluded to was a direction contemporaneous with the transfer. This would render a special direction necessary in every case of transfer where the powers had already been locally restricted under Section 38. But when the Local Government had already declared its intention on this subject, this would seem to me to be superfluous. And it does not appear to me necessary to put this construction on Section 56. I think that the words "unless the Local Government otherwise directs" reasonably construed, will include a previous restriction under Section 38 as well as one imposed when the transfer is made. This accords with the view taken by the Local Government of Assam, which (as before pointed out) clearly treated the powers conferred upon Mr. Carnegy as having come to an end.

Upon this last ground, therefore, I hold that Mr. Carnegy has no summary powers under Section 222 in the District of Kamroop, and I, therefore, think that we ought to quash the conviction, and discharge the sureties.

Mitter, J.—I am also of the same opinion. It seems to me that the effect of the Government Resolution, dated 1st of January 1873, was to confer upon Mr. Carnegy powers under Section 222 of the Criminal Procedure Code within the Sub-division of Jorehaut only. That being so, it cannot be said that he was "transferred to an equal or higher office" of the nature of which he held in the District of Seebsaugor. Because, supposing he was transferred within the meaning of that Section, and that he never vacated his appointment, the office to which he was transferred in the District of Kamroop is neither equal to, nor higher than, that he held in the District of Seebsaugor. A reference to Sections 27 and 28 of the Code will show that the powers of a Magistrate of a Division of a District are higher than those of a Magistrate of the first-class not in charge of any Sub-division. I am, therefore, of opinion that, under Section 56 referred to above, Mr. Carnegy did not continue to exercise the same power which he had while in charge of the Sub-division of Jorehaut.

The 12th June 1876.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Judge's charge to Jury.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of forgery, &c.

The Queen

versus

Chunder Kumar Muzoomdar, *Appellant.*

Baboo Doorga Mohun Dass for Appellant.

Baboo Juggodanund Mookerjee, the Junior Government Pleader, for Prosecution.

In charging a Jury, a Judge is not bound to do more than lay carefully and plainly before them the evidence as recorded by him, noting discrepancies and inconsistencies, and pointing out generally the way in which it is favorable or unfavorable to accused.

Glover, J.—The case of this prisoner was once before considered by the Court on appeal (Glover and Mitter, JJ.), and a new trial was ordered, on the ground that, in certain particulars, the Judge had misdirected the Jury, and that the accused had been prejudiced by the misdirection.

The accused has now been tried again, and the result is for the second time a verdict (unanimous) of guilty. He comes before us again on appeal, and his ground of appeal is the same as before (although, of course, the particulars are different), that the Judge has misdirected the Jury, and that he (the prisoner) has been thereby prejudiced.

Before considering his petition of appeal, which is a very long one of 23 separate paragraphs, I wish, with reference to what was said at the Bar, to declare my opinion that a Judge, in charging a Jury, is not bound to do more than lay carefully and plainly before them the evidence as recorded by him, noting the discrepancies and inconsistencies, and pointing out generally the way in which it either favorably or unfavorably affects the person being tried. He is not bound to place himself in the position of prisoner's advocate, or to press upon the attention of the Jury any little points which might tell in the accused's favor if they took a particular view of the evidence. He is not bound, as I understand his duty, to press his advice as to the way in which certain parts of the evidence may or should

be taken, or to insist, except in cases where the law prescribes it, that such and such evidence is credible or incredible. To do all this is the function of the prisoner's advocate; and although a Judge in this country, where trial by Jury is in its infancy, may be obliged to take a more active part in respect of charging a Jury, than he would be expected to do in other countries where the institution has been long and successfully established, there is a limit beyond which, in my opinion, he certainly ought not to go. I make these remarks, because, if the Judge was bound to do all that the petition of appeal declares that he ought to have done, he might as well have changed places with the prisoner's Counsel. Whilst the Jury would have had nothing to do but give effect to what the judgment should be as already explained to them by the Judge, the verdict instead of theirs would have been that of the officer conducting the trial.

To come, however, to the particular instances in which the Judge is said to have misdirected the Jury, I do not think it necessary to notice these objections regarding the charge, where the effect of what the Judge has said, so far from prejudicing the accused, was in his favor; and not a few of the appellant's objections come under this category. I shall confine myself to those instances in which the Sessions Judge's action is said to have been both wrong and prejudicial to the person on trial.

The first objection is that the appellant's pleader was not allowed to refer to the evidence given at the former trial, or to compare it with the depositions now given. This, I observe, is mere assertion; there is nothing in the Judge's charge to warrant the allegation, nor can I find anywhere on the record of the depositions any memo. to the effect that questions relating to evidence given at the first trial were not allowed. The accused, if he wished this Court to make enquiry into the point, should have supported his allegation by affidavit. Something, I think, was said at the time of hearing about procuring such an affidavit if time were given for the purpose, but it would have been improper to delay the hearing of the appeal on this account. The case had been for a long time before the Court, and the accused had been throughout defended by careful and able advocates. If there had been anything in his objection, it would have been, or at all events ought to have been, properly supported when the petition was filed.

As to the Judge's remark (*vide* para. 2 of the petition of appeal) about the alternative hypothesis that the Baboos and the prisoner had conspired together to raise loans on mooktearnamahs, which might afterwards be repudiated, no doubt, there is a mistake as to the author of the suggestion. It was not Baboo Doorga Mohun Dass, the prisoner's vakeel, who made the remark, but the Government Pleader; but, after all, what does it amount to? Any idea that it may have given rise to in the minds of the Jury as connected with a quasi-admission on the part of the prisoner's Counsel that, if his client were bad, his masters and employers were worse, must have been most thoroughly eliminated from them by the succeeding portions of the charge. A mistake of names was, no doubt, made, but, under the circumstances, I cannot see that it in any way prejudiced the accused.

As to the Mahajun's evidence, about which a great deal was made, I cannot see in what way the Jury were misdirected. The illustration used was perhaps not a happy one; but the evidence as to the Baboo's transaction with Bykunt Nath, after the first trial was over, was very fairly laid before the Jury, and it was for them to draw the inference. The money might have been paid either as a quasi-acknowledgment of indebtedness under the mooktearnamah, or in order to delay the threatened suit on the mortgage. The Jury were left to take which view they pleased. In one point, at least, the Judge's remarks were not unfavorable to the prisoner, for, although he put to the Jury the Koondoo's statement, and laid some stress on the circumstances under which the money had been paid, and on the inferences which it was possible to draw thereupon, he did not mention, what he ought to have done, that the Baboo denied any payment at all.

The 5th ground is untenable; it was no misdirection (*vide* the remarks in Queen *v.* Elahee Buksh, 5 W. R. 80) to say that the evidence of such and such witnesses appeared to be credible. The Judge was not debarred from saying this, and he left it to the Jury to decide whether they believed the witnesses or no.

With regard to the stamp-vendor, it appears to me that the Judge's remarks were quite justified. It was undoubtedly against this witness's interest to say what he did.

As for the objection that the Judge allowed hearsay evidence to go to the Jury, we are not told in the petition how and when such evidence was given, or how it preju-

diced the accused. One or two instances of a witness having said in the course of his examination things that he had heard only have been pointed out by the prisoner's Counsel; but they are generally of the most trifling character, and could, I take it, have had no effect on the Jury either one way or the other. Of the other objections, some refer to matters on which the Judge has distinctly favored the prisoner, others relate to omissions which, it is said, the Judge ought not, in fairness to the prisoner, to have committed. I do not think it necessary to go *seriatim* into all these points. The Judge might have dissected the evidence more completely (although I, for my part, consider his charge a very painstaking and laborious one), but I do not think that he was in any way bound to do so. As I said before, I consider that a Judge does his duty when he lays all the evidence fully and fairly before a Jury, and that he is not bound to go into a long and laboured argument to show how this witness is to be believed, or that witness to be discredited, why this set of circumstances appear to be true, and that to be false. It is the advocate's business to lay all this before the Jury, not the Judge's.

I should call the present charge a remarkably fair one; in many parts it is decidedly in favor of the prisoner, and in all it is scrupulously unbiased. As to whether the Judge's estimate of the evidence was a correct one (and this, after all, is the substantial ground of dissatisfaction with the charge) is a matter with which we have nothing to do. I cannot say that it recommends itself fully to my judgment, and if we were trying the case as an appeal upon that evidence, we might possibly come to a different conclusion; but the Jury were the sole judges of the weight and effect of that evidence, and, as it seems to me, every thing was fairly and properly laid before them. This case has occupied the Court many days, but, after full consideration, I cannot say that there has been any material error in the Judge's charge, or any reason to believe that, so far as the presiding officer is concerned, the prisoner has not had a fair trial.

There remains the question of punishment. By law, the extreme limit of imprisonment would be ten years; it has been suggested that, as the Judge found the prisoner guilty on two separate charges, the punishment of fourteen years' rigorous imprisonment commuted to transportation was a lump sentence for both offences, and was therefore legal. It may be that the Judge intended his sentence to operate as stated, but it is hardly worth while going further into the matter, as I consider that the sentence of fourteen years' rigorous imprisonment, whether legal or illegal, is much too severe. I do not forget the nature of the prisoner's crime, nor deny that it is one which should be severely visited; but fourteen years' imprisonment is in this country, and at the prisoner's age, almost equivalent to a sentence of death in prison, and there are, in this case, other circumstances which, I think, justify us in passing a more lenient sentence. The appeal is so far dismissed in that the Judge's order convicting the prisoner is upheld, but the sentence is altered to one of seven years' rigorous imprisonment, in calculating which the time that the prisoner has already been in jail will be taken into account.

Kemp, J.—I do not propose to say much upon the question of how a Judge ought to charge a native Jury. The decision of the Full Bench—Volume V., W. R., Elahee Buksh, appellant—is the leading case upon this point. I think a native Jury has a right to expect from the Judge "sound and proper advice and assistance as regards the degree of weight which may fairly be attached to the testimony of particular witnesses. The law requires the Judge to sum up properly, and if a failure of justice has been caused by improper advice upon a question of fact, or by an omission to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give upon questions of fact, or as to the degree of credit to be given to particular witnesses, that there ought to be a remedy by appeal against a verdict of guilty." In the case before us, the prisoner has had two trials. The Jury consisted on both occasions entirely of Hindoos, and they have unanimously arrived in both trials at the same verdict of guilty.

The charge of the Judge is a very elaborate one, and after carefully considering the several objections to it which have been raised by the learned Counsel for the prisoner, I am not prepared to say that the prisoner has not had a fair trial, or that the omissions in the charge pointed out by the Counsel have materially prejudiced the prisoner, much less caused a failure of justice.

I propose to notice some of the main objections.

In the 3rd ground of appeal, it is stated that the Judge has materially misdirected the Jury in telling them not to attach much importance to the evidence of the witness Baboo Bykunta Nath Koondoo, and that the

illustration put forward by the Judge to explain away the effect of that evidence is altogether inapplicable, and was calculated to mislead the Jury.

Now, the Jury's attention was called to the fact that the vakeel for the prisoner had attached much importance to the evidence of this witness. The Judge then places before the Jury the substance of what the witness deposed to, and added these remarks: "Both sides have tried to give this evidence a complexion to suit their own case." The Judge then remarks, and this is in favor of the prisoner, that the contention of the Counsel for the prosecution, *viz.*, that it was the interest of the Rajnuggur Baboos to pay Rs. 6,000, as they were under a threat of being sued by the Koondoos for a much larger sum due under a mortgage, was a fallacy; at the same time, he tells the Jury, and this is not in favor of the prisoner, that the vakeel for the defence was wrong in drawing an inference that the Rs. 6,000 was paid to the Koondoos by the Rajnuggur Baboos, because they felt the justice of the demand. Then follows the illustration which had better been omitted. It is matter for observation that the Judge did not tell the Jury that the Baboos altogether denied the payment of Rs. 6,000. The evidence of the witness was put to the Jury with the theories and inferences drawn from that evidence by both sides, and they were left to exercise their own judgment. With regard to the evidence of the stamp-vendor, it is objected in the 6th ground, that the Judge "erred in not pointing out to the Jury the manifest contradictions and false statements in the evidence of this witness tending to show that he had been tampered with."

The Judge remarked, with reference to this witness, that he was called for the defence, but that, in reality, his evidence went very strongly against the prisoner, and there can be no doubt that such is the case. The Jury were competent to form their own opinion as to whether this witness had been tampered with or not.

With reference to the objection that the Judge ought to have instructed the Jury to attach great importance to the fact that a portion of the money raised on the strength of the forged mooktearnamahs was spent in the service of the Baboos, I find, on referring to the Judge's charge, that he did tell the Jury, that, even admitting the item of expenditure as per accounts submitted by the prisoner, there was a considerable deficit. The Judge points to some items in the account which he thinks the prisoner may justly say he expended for the Baboos. The whole matter was left for the determination of the Jury, who were perhaps more competent than the Judge to decide whether the accounts submitted by the prisoner were satisfactory or not. The other objections are of minor importance, and have been dealt with by my learned colleague. On the whole case, after careful consideration, I think that there have been no misdirections to the Jury, which have caused a failure of justice, or materially prejudiced the prisoner. It is easy to pick out flaws in a very long and somewhat argumentative charge; but, on the whole, I am bound to say that the case was fairly put to the Jury, and that in many instances the Judge's remarks were very favorable to the prisoner. I concur in mitigating the sentence, and would dismiss the appeal.

The 15th June 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Substantial irregularities in criminal proceedings.

(Miscellaneous Case.)

The Queen

versus

Bholanath Sein, *Petitioner.*

Mr. M. Ghose and *Baboo Boido Nath Dey* for the Petitioner.

Criminal proceedings are bad, unless they are conducted in the manner prescribed by law; and if they are substantially bad in themselves, the defect will not be cured by any waiver or consent of the accused.

No man should sit as a judge in a case in which he has a substantial interest.

A Magistrate should not give evidence in a case in which he is acting judicially, if he can possibly avoid doing so.

Macpherson, J.—THIS is an application to the High Court under Section 297 of the Criminal Procedure Code.

The petitioner Bholanath Sein has been convicted by a Bench of Magistrates at Midnapore on two charges of breach of trust under Section 409 of the Indian Penal Code. He was sentenced to two periods of imprisonment, amounting *in all* to two years' rigorous imprisonment, with a fine of Rs. 1,000, and, in default of payment of the fine, six months' additional imprisonment.

We are asked to quash the conviction, on the ground of various substantial illegalities

and irregularities, most of which are set forth in the petition presented to this Court.

The seventh of the grounds stated in the petition is, that it was illegal and improper that a certain Mr. Larymore should have been one of the Bench of Magistrates who tried this case. It appears to us that this is a good ground of objection, and that, under the circumstances, the presence of Mr. Larymore, who had a substantial interest in the prosecution, vitiated the proceedings, and makes it necessary that the conviction should be quashed.

The prisoner Bholanath Sein was the Jailor of the district jail at Midnapore, of which Mr. Larymore was the Superintendent at the time of the trial, and at the time of the commission of the offences for which Bholanath Sein was tried. Bholanath Sein was Mr. Larymore's immediate subordinate in the management of this jail, and the moneys, the receipt of which was the subject of the first charge, were drawn by him from Government on the strength of certain bills or vouchers which (although, in fact, incorrect) Mr. Larymore had been induced by the accused to countersign as correct; while, as regards the second charge, which was for receiving payment for certain oil at a higher rate than he credited to Government, the defence was (and Mr. Larymore proved it to be true) that Mr. Larymore had himself sanctioned the sale at the rate with which the prisoner credited the Government. The whole case was that the prisoner, by deceiving and imposing upon Mr. Larymore, had fraudulently got the sums of money, the receipt and appropriation of which was charged against him as criminal breach of trust. Mr. Larymore being the Superintendent in charge of this jail, and being connected in this manner with the sums which the prisoner was alleged to have misappropriated, it is evident that he was most substantially interested in the matter, and that he was by no means free from the possibility of pecuniary responsibility in respect of it. That being so, it was most unfortunate that the District Magistrate should have thought fit to select Mr. Larymore to sit as one of the Judges in the case.

The Magistrate says that Mr. Larymore was friendly to the prisoner, and that it was with a desire to assist the prisoner that he put Mr. Larymore on the Bench. But the Magistrate really erred, if he selected Mr. Larymore, because he was supposed to be specially friendly to the prisoner, almost as much as he would have erred had he selected him for the opposite reason. A criminal prosecution is not in the nature of a friendly arbitration. It is a penal proceeding of a very grave and serious kind, which it is impossible to proceed too strictly according to the rules prescribed by law. Connected as Mr. Larymore was with the prisoner in the very matters which were the subject of the trial, it is impossible that his sitting as one of the judges could be right. It is one of the oldest and plainest rules of justice and of common sense that no man shall sit as judge in a case in which he has a substantial interest. That is the law of this country, as much as it is the law of England. [See the decision of a Full Bench of this Court in the case of the Government *v.* Hera Lall Dass, 17 W. R., page 39, Criminal Rulings, and the cases there referred to. See also a very recent case in England, the Queen *v.* Meyer, Vol. L. Law Reports, page 173, Q. B. Divn.]

The District Magistrate says that Mr. Larymore's interest in the matter was very indirect. In this we cannot agree with him, for it is quite clear, even from the evidence given by Mr. Larymore himself, that he had a most distinct and substantial interest. Under certain circumstances, it might have proved a direct pecuniary interest. The District Magistrate himself says as to the second head of charge: "There is this to be "said in palliation of it, that Mr. Larymore's "consent was obtained to the price, while "the quantity sold was probably fixed in the "accounts with a view to square the monthly "statements."

We think that, were it on this ground alone, the conviction ought to be quashed.

But, in addition to this, there are several other very serious irregularities to which our attention has been called.

The Bench of Magistrates consisted of the District Magistrate, Mr. Harrison, Mr. Larymore, the Officiating Superintendent of the Jail, Dr. Bachelor, and two native gentlemen, being a bench of five. In the course of the trial, both Mr. Harrison and Mr. Larymore were examined as witnesses for the prosecution.

Without saying that it is illegal for a Magistrate to give evidence in the witness-box in a case with which he is dealing judicially, it clearly is on general principles most undesirable that a Judge should be examined as a witness in a case which he himself is trying, if such a contingency can possibly be avoided. (See the Full Bench case, 17 W. R., page 39, C. R. already

referred to.) The mere fact that Mr. Harrison and Mr. Larymore were necessary witnesses for the prosecution was a most cogent reason why neither of them should have been members of the Bench by which the prisoner was to be tried. Mr Harrison was almost as much out of place in the Bench as was Mr. Larymore. For the whole alleged fraud was discovered by Mr. Harrison himself; the prosecution was initiated and the Government pleader was instructed by him; and he was one of the most important witnesses for the prosecution.

That being the District Magistrate's position, we cannot conceive why he did not place the case (which is really a very important one) before some Magistrate in no way connected with it, who might have disposed of it himself, or might have committed the accused for trial to the Sessions, instead of going out of his way to have the case tried by a special Bench composed of Magistrates, of whom two were manifestly objectionable. In making these remarks, we do not say that a Magistrate is incapacitated from dealing with a case judicially, merely because, in his character of Magistrate, it may have been his duty to initiate the proceedings. We only say that it was wrong that the District Magistrate should deal with this case judicially when there was no sort of necessity for his doing so, when he had himself discovered the alleged fraud, and initiated the prosecution, and when he was one of the principal witnesses against the prisoner.

Then again, we find that, after the case for the prosecution was closed and formal charges were drawn up, and the accused had given the names of the witnesses whom he intended to call, Mr. Larymore was deputed by his brother Magistrates to go and take the depositions of some of these witnesses. Mr. Harrison, in his judgment, says: "When the witnesses for the defence were "named, most of them were connected with "the jail. As it would certainly be said, "by whatever party they gave evidence "against, that they had been tampered with, "the Court suggested, and both sides agreed "that these statements had better be taken "down *at once* in the presence of the agents "of both parties and of one of the Honor-"ary Magistrates, to guard against subse-"quent deviation. Accordingly, they were "questioned, and their answers recorded, in "this way on the 12th and 13th November, "and the statements are placed with the "record for the use of either party, though "not themselves evidence." We are unable to understand what such a proceeding is supposed to mean. Here is a man being tried on a very serious charge, who names the witnesses whom he means to call. Thereupon "the Court" suggests that, "to guard against subsequent deviation," the statements of these witnesses should be taken down at once in the presence of one of the Honorary Magistrates and of the prisoner's agent. Accordingly, the statements are taken down by Mr. Larymore, and the depositions so recorded "are placed with the record for the use of either party, though not themselves evidence." This was a most irregular and unfair proceeding. The Court had no possible right to receive from Mr. Larymore or from anybody else statements recorded after such a fashion, or to place these statements with the record, if they were not themselves evidence. As a matter of fact, those statements were taken down, and were placed with the record for the sole purpose of being used against the prisoner. And they are practically so used by the Magistrate, Mr. Harrison, when, in his judgment, he says: "Now, Uma Churn Chatterjee's "evidence, I have already said, I consider "quite unworthy of credit; and *it will be* "*observed that, when his statement was* "*taken before Mr. Larymore on November* "*13th, he was never questioned about* "*these purchases, or said anything about* "*them.*"

In our opinion, the deputing Mr. Larymore to take in an irregular way the statements of the witnesses whom the prisoner meant afterwards to call in support of his defence was most unfortunate. It was quite illegal and unjustifiable.

The District Magistrate, Mr. Harrison, in his judgment says that, when "the Court suggested that these persons should be examined at once in the presence of one of the Honorary Magistrates, both sides agreed that this had better be done." And doubtless he relies on that "agreement" as justifying and sanctioning what was done. So as regards the objection taken to Mr. Larymore's being on the Bench and to Mr. Harrison's own presence there, he relies on the consent given by the prisoner in the first instance.

The District Magistrate has throughout these proceedings treated them very much as if they had been proceedings pending in a civil suit, and has lost sight of the wide difference which exists between a civil suit and a criminal prosecution. Criminal proceedings are bad, unless they

are conducted in the manner prescribed by law; and if they are substantially bad in themselves, the defect will not be cured by any waiver or consent of the prisoner. When the irregularities are all unfavorable to the prisoner, as, in our opinion, they clearly were in the present case, it is impossible for any Court to consider a waiver or consent as binding on him. It is the duty of Magistrates and all Criminal Courts to follow the procedure prescribed by law, and there is no law which sanctions their intentional departure from that procedure, and their attempting to protect themselves against the consequences of such departure by getting the accused person to say he consents to it. In the mofussil, most prisoners not properly defended would probably assent to any irregularity which the Judge or Magistrate trying him chose to suggest. There would be an end to all procedure if such an assent were held to warrant material and important irregularities.

But, after all, what really was the nature of the consent given by the prisoner as to the composition of the Bench? After the witnesses for the prosecution had been examined, formal charges were on the 10th of November drawn up, and the plea of "not guilty" was recorded. The accused gave the names of his witnesses, and the further hearing was adjourned to the 4th of December. In his judgment, Mr. Harrison says: "After the charge was "drawn up and the case resumed after the "long adjournment for the defence, the "accused's Counsel objected to the composi-"tion of the Bench, both to Mr. Larymore's "presence on it and to mine. Except under "the special circumstances of the case, "Mr. Larymore's presence on the Bench "might obviously be questionable; and "hence, before commencing the trial, the "accused and his pleaders were expressly "asked if they had any objection to the "composition of the Bench, when they "distinctly stated that they had none what-"ever, &c."

It is to be noted that the objection was raised and pressed, before the case had proceeded further than the point of drawing up formal charges, and recording the plea of "not guilty," also that, before that time, both Mr. Harrison and Mr. Larymore had given evidence as witnesses on behalf of the prosecution. But it is not stated, and there is nothing to lead us to suppose, that, when the prisoner was asked whether he objected to the composition of the Bench he was warned that Mr. Harrison and Mr. Larymore were both very important witnesses for the prosecution.

The record of the case does not show that when the prisoner was first brought before this, Bench, he was asked whether he objected to its composition, except that Mr. Larymore deposes to the fact, which is confirmed by Mr. Harrison in his judgment. It is a matter of comparatively little consequence whether it is recorded or not. But, if the Magistrates really intended to rely on the prisoner's consent, that consent ought to have been formally and accurately recorded at the time it was given.

On these grounds, and without entering into the other objections which the prisoner's Counsel take to the conviction, we think it clear that there have been most serious and material errors in the proceedings in this case, which have been greatly to the prejudice of the prisoner. We therefore set aside the conviction and sentence, and order that the prisoner be discharged, and that the fines, if paid, be refunded to him.

The Magistrate of the District, no doubt, had authority to direct that this case should be tried by a Bench of Magistrates. But a complicated and somewhat difficult case like this is by no means one which it is desirable to place before such a Court. And the result shows that this is so. The case is one in which the strictest accuracy is necessary, whereas the proceedings have been diffuse and loose in the highest degree. Moreover, there is not one "judgment" by the Court, but a series of judgments, which, to say the least of it, is most inconvenient. Mr. Harrison writes the judgment (a most voluminous one) on the first charge, and says that he concurs with Mr. Larymore's judgment on the second charge. Mr. Larymore writes a judgment on the second charge, and says he concurs in Mr. Harrison's judgment on the first charge. Dr. Bachelor writes that he concurs in the judgments of Mr. Harrison and Mr. Larymore. And the two Native Magistrates write a long judgment of their own. All the five Magistrates, however, do join in signing in a regular way the final "finding and sentence" of the Court.

The case comes before us under somewhat peculiar circumstances, for the prisoner availed himself (as to a portion of his case at least) of his right of appeal to the Sessions Judge. The appeal was unsuccessful,

gh he, in his petition, repeated his ections to the constitution of the Court ich tried him.

Notwithstanding that the appeal was missed, it appears to us that the irregu-ities on which we have dwelt are so ious and so important as to render it erative on us even now to quash the ole proceedings.

The 31st May 1876.

Present:

e Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

aterial error in judicial proceeding—Retrial.

In the Matter of

The Petition of Hurriprosad Dutta.

Where a retrial had been ordered by the High Court, the ground that the evidence of an important witness d not been taken, and the Court of first instance, after ording the evidence of that witness, refused to recon-der all the old evidence, except in so far as it was ected by the deposition of the fresh witness, but the wer Appellate Court had fully reconsidered all the evi-nce, old and new, and adhered to its former decision, ding that, from its official knowledge of the fresh wit-ess, it did not consider his evidence trustworthy: HELD y the High Court that, whatever view it might have ken of the decision on an appeal on all the facts, it ould not set aside the decision on the ground that any aterial error had occurred in a judicial proceeding.

THE case of this petitioner was before his Bench on the 5th of November 1875,* having been called for under Section 297, Criminal Procedure Code. The petitioner had been convicted of an offence under Section 409, Indian Penal Code, and sentenced to two years' rigorous imprisonment.

We were of opinion that the record disclosed at least two serious errors of procedure, by which the petitioners might fairly be supposed to have been prejudiced, and that his case ought to be reheard.

We pointed out that the evidence of the Extra Assistant Commissioner ought to have been taken, and that the omission to do so was prejudicial to the petitioner, and afforded ground for the interference of this Court. We further remarked that the petitioner had not had a reasonable time given to him by the Judicial Commissioner for the hearing of his appeal.

With reference to the argument then addressed to us by the learned Counsel for the petitioner, *viz.*, that, "because the evi-"dence was discrepant, this Court would be "justified, as a Court of revision, in treating "this case as a conviction arrived at on "no legal evidence," we intimated our opinion that "a decision given on evidence, "which was in some parts discrepant, and "about which there might be considerable "question, would not, even if this Court "thought the evidence doubtful, be a ma-"terial error in a judicial proceeding." It was not contended that the petitioner had been convicted on no evidence, but that the evidence was discrepant, and such as different persons might entertain different opinions about.

We, therefore, sent back the case with directions "to take the evidence of the "Extra Assistant Commissioner, and to retry "the case after hearing that evidence." Further, "that, in the event of an appeal to "the Judicial Commissioner, the provisions "of Section 278, Criminal Procedure Code, "should be attended to, and reasonable time "given within which the petitioner, or his "Counsel, or authorized agent, might "appear."

The evidence of the Extra Assistant Commissioner, after some delay, has been recorded, and the case, with this additional evidence, came before Mr. Mathews, Assistant Commissioner, who was not the officer who first

* See 24 W. R., C. R.

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tried the case. He has upheld the finding and sentence of his predecessor, Captain Michell, Assistant Commissioner, although he was of opinion that the sentence, "considering the comparatively small value of "the property, and the terrible infliction "which the undergoing of rigorous imprison-"ment must be to a man like the accused, "who too has previously borne an unblem-"ished character, was extremely severe.

On appeal, the conviction and sentence have been upheld by the Judicial Commissioner.

The petitioner again moved this Court. The main grounds of his petition are: *1st.*—That the Judicial Commissioner had talked over the case with Mr. Mathews, the Assistant Commissioner, and influenced that officer in his decision. *2ndly.*—That, although the Assistant Commissioner, Mr. Mathews, stated as his opinion that there actually were what appear at first sight, at any rate, serious objections to the credibility of the evidence for the prosecution, arising chiefly from the inconsistency, partiality, and animosity of certain witnesses, yet he declined to consider the said objection, on the ground that it must have been considered by his predecessor, Captain Michell, and the Judicial Commissioner; and that he, Mr. Mathews, was not required by this Court to form any independent judgment in the case. *3rd.*—That, on the appeal coming before the Judicial Commissioner, that officer discredited the evidence of the Extra Assistant Commissioner on grounds wholly unconnected with, and not appearing on, the record and solely founded on inferences drawn by the said Judicial Commissioner from matters within his personal knowledge. *4th.*—That the said Assistant Commissioner and Judicial Commissioner have committed material errors in the course of the trial and in the appellate stage of the case.

The first ground is not supported by any evidence, and is an unwarranted reflection upon the local authorities.

On the second ground, we find, on turning to the decision of the Assistant Commissioner, Mr. Mathews, who took up the case after the remand by this Court, that he considered that he was not at liberty, nor called upon, to decide upon the value of the previous evidence, except in so far as the deposition of the Extra Assistant Commissioner affected it. The passage alluded to in the petitioner's petition to this Court also occurs in the judgment of the Assistant Commissioner.

With reference to the additional evidence, that of the Extra Assistant Commissioner, which has been taken by order of the Court, Mr. Mathews observes that the Extra Assistant Commissioner might have entirely forgotten "the fact that a mere verbal state-"ment was made to him by the complainant "that he made over the elephant tusks to "the accused, the petitioner."

There can, we think, be no doubt that Mr. Mathews formed no independent opinion upon the whole evidence; in short, that he did not retry the case, as he was directed to by our order of remand. And if his decision had been simply affirmed by the Judicial Commissioner on appeal, we should have thought it right to order a new trial; but we find, on turning to the decision of the Judicial Commissioner, that he states that "he has again gone carefully through "the case, and that he maintains the opinion "previously entertained by him, *viz.*, that the "evidence, considered as a whole, including "that of the Extra Assistant Commissioner, "fully sustains the charge preferred against "the accused, and that no doubt existed in "his mind as to the guilt of the accused." The Judicial Commissioner further states that he greatly regrets that the Extra Assistant Commissioner's evidence cannot be relied on, and he refers to the conduct

at officer whilst in charge of the Gola- Sub-division and to other circum- ces officially known to the Judicial missioner, which made it impossible for to regard the Extra Assistant Commis- r as a reliable witness. His opinion he whole case is clear as to the guilt e accused. We are, therefore, of opinion whatever view we might have taken he evidence, had the case come before s an appeal upon the whole of the facts, cannot, as a Court of revision, say that, use the evidence is in some respects repant, that there is no evidence upon h a conviction under Section 409 could legally arrived at. We, however, think the sentence is too severe, and we reduce six months' rigorous imprisonment.

The 16th June 1876.

Present:

Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Summons case—Dismissal—Acquittal.

(Miscellaneous Case.)

Irfan Biswas, *Petitioner,*

versus

Jinnut Bibee, *Opposite Party.*

Baboo Bungshee Dhur Sein for the Petitioner.

Baboo Juggodanund Mookerjee for the Opposite Party.

he dismissal of a case in which a summons issues the first instance amounts to an acquittal of the accused, against whom, after such an acquittal, no further proceedings in respect of the same act can be taken under a different charge.

Kemp, J.—The petitioner was charged of an offence under Section 447, and that was the charge he pleaded to.

The Deputy Magistrate, after making a local-investigation, and after taking evidence on both sides, found that the plaintiff was not in the exclusive enjoyment of the fruit of the garden, the subject of dispute. He also found on the evidence of Moulvie Hassan that the complainant Jinnut Bibee had relinquished her jumma of the garden in question; and he dismissed the case and discharged the accused.

The Magistrate now takes up the case as if the charge had been one of theft, and he directs that a warrant be issued against the petitioner, and that the case come before him to be disposed of.

We granted the petitioner a rule to show cause why the order of the Magistrate should not be set aside. Nobody appeared to show cause when the case was taken up. But when the Court was delivering judgment, Baboo Juggodanund appeared for the opposite party, and we refused to hear him.

This was a case under Section 447. It was, therefore, a summons-case. Under Section 212 of the Criminal Procedure Code, the Deputy Magistrate having framed a charge under Section 447, and dismissed the case, that dismissal amounted to an acquittal.

We, therefore, think that no further proceedings can be taken against the petitioner on a different charge, which he has not at any time been called upon to answer.

The rule is made absolute.

The 16th June 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Jurisdiction—Revival of complaint after discharge.

(Miscellaneous Case.)

The Queen

versus

Zuhoorul Huq and others, *Petitioners.*

Mr. R. E. Twidale and *Moonshee Mahomed Yusoof* for the Petitioners.

Baboo Juggodanund Mookerjee, the Junior Government Pleader, for the Crown.

Where a Deputy Magistrate, under Section 210, Criminal Procedure Code, permitted a complainant to withdraw a complaint which was not considered heinous, and discharged the accused, and the District Magistrate revived the case against the accused at the instance of the Commissioner: HELD that the Magistrate had no jurisdiction to act as he did.

Macpherson, J.—THIS is an application to quash an order of the Magistrate of Monghyr of the 28th of April, reviving the prosecution against the present petitioners and others, and to stay all further proceedings in the matter.

A complaint was made against the petitioners on the 27th of October last under Sections 143 and 323, Indian Penal Code, of rioting and causing hurt. A variety of proceedings were held, and on the 24th of January, Mr. Reily, the Deputy Magistrate, before whom the complaint was pending, having examined the witnesses for the prosecution, drew up charges against the petitioners, under Sections 147 and 325, charging them with rioting and causing grievous hurt. These charges were drawn up on the 24th of January, when the 1st of March was fixed for proceeding with the case, and the witnesses for the prosecution ordered to attend on that day. The witnesses did not attend on the 1st of March, and on the next day, Mr. Reily was transferred from his office, and was succeeded by Mr. Hampton. On the 3rd of March, Mr. Hampton, exercising his powers under Section 328, Criminal Procedure Code, resolved to begin *de novo* with the case, and fixed the 20th of March for taking the evidence of the prosecutor and his witnesses. What happened on the 20th of March does not exactly appear; but on the 21st March the prosecutor presented a petition to Mr. Hampton, representing that he lacked means to carry on the prosecution, and asking that the charge might be withdrawn and the case put an end to. On this Mr. Hampton made the following order: "In this case "it appears that the complaint, as originally "instituted, was of a trivial nature. The "prosecution states that he does not wish "to proceed with the case, and to commence "the trial *de novo.* Under the circum-"stances, I do not see that there is any "advantage to be gained in commencing "afresh a case which was instituted several "months ago, and which the prosecutor "does not wish to proceed with. I strike "off the case, and direct that the defendants "be discharged."

This was on the 21st of March. On the 28th of April, Mr. Lockwood, the Magistrate of the District, acting on certain instructions from the Commissioner, which are not before this Court, directed that the prosecution should be revived and proceeded with, not before Mr. Hampton in whose Court the

case had been pending, but before the Joint Magistrate of Monghyr.

The petitioners object to this order of the Magistrate reviving the prosecution. They contend that the complainant having been permitted by the Deputy Magistrate (under Section 210) to withdraw his complaint, and the complaint having been, in fact, withdrawn, it cannot again be entertained.

We think the objection is good, and that the Magistrate had no jurisdiction to direct the prosecution to be revived and continued in the manner he has done. It is true that Mr. Reily had, on the 24th January, drawn up a charge of grievous hurt against the accused; but on Mr. Reily's removal from office, Mr. Hampton, acting under Section 328, resolved to commence afresh. Having determined to adopt this course, Mr. Hampton was right in thinking that the matter was before him on the foundation of the original complaint as laid before Mr. Reily.

It seems to us clear that, under Section 210, the complaint, having been withdrawn, could not be entertained again. It seems to us further, on a consideration of Mr. Hampton's order, that there is no reason for supposing that he acted otherwise than rightly in allowing the charge to be withdrawn. If the offence of these petitioners was a very serious one, it is remarkable that, between the making the complaint on the 25th of October and the 2nd of March, when Mr. Reily was transferred to another station, the case had gone no further than the examination of the witnesses for the prosecution and drawing up charges. If the case was of any great consequence, it ought to have been tried and disposed of long before the 2nd of March.

We quash the order of the Magistrate of Monghyr of the 28th April last, and all subsequent proceedings.

The 11th July 1876.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Mischief—Summary trial—Section 227, Criminal Procedure Code.

Criminal Rule No. 176 of 1876.

In the Matter of

Issur Chunder Mundle and others, *Petitioners,*

versus

Rohim Sheik and others, *Opposite Parties.*

Messrs. Branson and *Palit* and *Baboos Krishna Komul Bhuttacharjee* and *Mohit Chunder Bose* for the Petitioners.

Baboos Kali Mohun Doss and *Bhobany Churn Dutt* for the Opposite Parties.

A summary trial under Section 227, Criminal Procedure Code, being intended to apply only to short and simple cases, where little evidence is needed: HELD that the proceedings of a Magistrate thereunder, covering more than 130 pages and occupying 7 days, were an abuse of the law. HELD also that a *bonâ-fide* claim of title deprives a Magistrate of jurisdiction to deal with a criminal charge in a summary way.

Also that, in order to convict one of the offence of mischief under Section 426, Indian Penal Code, it is for the prosecution to prove that the accused caused damage with a wrongful intent—with a knowledge that he was not justified in doing it, and that the party under whose orders he was acting had no real title.

IN this case, certain persons have been convicted under Section 426, Indian Penal Code, of the offence of mischief, and sentenced to a fine of Rs. 20, or fifteen days' rigorous imprisonment each. The mischief charged was the causing cattle to trespass and graze on the prosecutor's land.

The proceeding was nominally, by way of summary trial, under Section 227, &c., Criminal Procedure Code. Practically, it was a very hotly contested suit, in which the

does not bar the revival of a prosecution for the same offence, yet the legislature never intended that the prosecution could be revived on the evidence already heard and disbelieved; it can only be revived on fresh and reliable evidence, for otherwise there will be no end of revivals and tutoring witnesses, and will cause a good deal of annoyance and trouble. It was further contended that it is only when the order of discharge is made improperly, namely, when an accused is discharged without taking the evidence of witnesses for the prosecution, that a further enquiry can be made, or the matter revived. In this case, all the witnesses called for the prosecution were examined, and therefore the discharge was legal and proper.

Decision of the Court.

It seems to us to be clear that this case came before the Magistrate under Section 295 of the Criminal Procedure Code, and that it was in the first instance dealt with by the Magistrate under that Section. That being so, his proper and only course was to proceed under Section 296 to report the case for orders to the High Court, which, under Section 297, might have ordered the accused persons to be tried, if of opinion that they had been improperly discharged. A case (*Re Syda Bin Satya*) quoted by Mr. Prinsep in his last edition of the Code of Criminal Procedure as having been decided by the High Court has been referred to as showing that the Magistrate was right in the course he adopted, but that case is not reported in the regular reports of the Bombay High Court, nor have we been able to find any report of it. The full facts with which the Bombay Court had dealt are not before us, and we are unable to say how far the Court may really have gone, and the note we have of this decision is of little value, and, taking it as it stands, we are not prepared to agree with it as regards the case coming before the Magistrate under Section 295.

Dealing with the matter under Sections 294 and 297, we think there is a material error in the Magistrate's proceedings, and that his order directing the Joint Magistrate to entertain the fresh complaint now made and all subsequent proceedings ought to be quashed.

Whatever may have led to the various delays which have occurred in the prosecution of this since the 21st July 1875, there is no doubt that great and unfortunate delays have taken place. It is as a rule most unfair and undesirable in every way to order an accused person to be tried over and over again for the same offence, unless under very peculiar circumstances. In the present instance, there is nothing peculiar in the circumstances to warrant a third trial, and it seems to us wrong and improper, within the meaning of Section 294, that an order should be made directing the prosecution to be now commenced.

The order of the 10th day of February and all subsequent proceedings are quashed.

The 2nd June 1876.

Present:

The Hon'ble L. S. Jackson and W. F. McDonell, *Judges.*

Proceedings under Section 530, Criminal Procedure Code—Breach of the peace—Attachment.

Reference to the High Court, under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Tipperah.

The Queen

versus

Kaly Kishore Roy, *1st party*, Kaly Nath Roy, *2nd party*, and Guggun Chunder Roy, *3rd party*.

Where a Magistrate, being in doubt as to which of two persons was rightful owner of some disputed property, attached it in order to prevent a breach of the

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peace, and released it on their coming to an agreement, but subsequently re-attached it on the appearance of a third claimant, from whose attempt to obtain possession a breach of the peace was apprehended: HELD that the Magistrate was only competent to order a fresh attachment after taking the preliminary steps under Section 530, if, on completion of enquiry, he found himself in the position described in Section 531; and that, if there was any new dispute, he ought to have proceeded *de novo*; but that the best course to pursue would be to exert his powers under Chapter XXXVII.

Jackson, J.—THE Magistrate's order appears to be illegal, but we do not consider that the course suggested by the Sessions Judge in his ineffectual note of 5th April is the one which ought to have been taken.

It appears that the original parties to the dispute have settled their differences, and the Magistrate, on being certified of this, ought to have taken off the attachment which was brought about by his inability to determine as between them with whom the possession lay.

It seems that a new claimant has appeared, and the Magistrate alleges an apprehension that, if the attachment is removed, this claimant will seek to obtain possession, and, in his endeavour to do so, will commit a breach of the peace.

But he has no authority either to maintain the old attachment or to make a new one on this account, because he is only competent to order such attachment after he has taken the preliminary steps under the 530th Section, and *after enquiry* finds himself in the position described in Section 531.

As regards the new dispute, therefore, if there be any, he must, if he sees occasion, proceed *de novo* under Section 530. But the much preferable and simpler course would be to exert the powers given him by Chapter XXXVII., Code of Criminal Procedure.

The attachment is hereby set aside, and is further declared of none effect from the date of the Magistrate being certified of the settlement of the original dispute.

The 6th June 1876.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Mischief—Guilty knowledge or intent—Breach of embankment—Summary procedure.

(Miscellaneous Cases.)

No. 101, Pran Nath Shaha, *Petitioner.*

Baboo Mohinee Mohun Roy for the Petitioner.

No. 102, Roma Nath Banerjee, *Petitioner.*

Mr. W. Jackson and *Baboo Chunder Madhub Ghose* for the Petitioner.

Where an accused person had, at the instance of the Magistrate who had come across him while out walking one morning, been placed on his defence for mischief, and summarily tried and sentenced to two months' rigorous imprisonment; and the Magistrate had, by a letter to the Registrar of the High Court, furnished the explanation that the accused had, while extending a garden and laying the foundation of a house, encroached on the inner slope of a river-embankment, and thereby endangered the safety of the whole station: HELD, *firstly*, that in order to justify a conviction for the offence of mischief, it must appear that the accused person had done a particular act with intent to cause, or knowing it to be likely to cause, wrongful loss; and that, as the house and garden on which the accused was engaged would be the first to be swept away in the event of the dreaded breach in the bund and consequent irruption of the river, such guilty knowledge or intent could not reasonably be inferred on his part; and, *secondly*, that, in a case of this kind, where Government had been made prosecutor, but no complaint had been offered to the Magistrate, who had acted on his own impulse, the Magistrate had erred seriously in dealing with the case summarily, and sentencing off the accused to imprisonment.

Jackson, J.—THE petitioner before us, Roma Nath Banerjee, resident of Maldah, has been convicted, under Section 426 of the Indian Penal Code, of the offence of mischief, before the Magistrate of the district of Maldah, under the summary procedure prescribed in Chapter XVIII. of the Code

of Criminal Procedure, and has been sentenced to rigorous imprisonment for two months. The information afforded to the Court of revision in these cases is extremely scanty; but that which is contained in the extract register sent up in this case, containing the particulars prescribed by Section 227, is supplemented in some degree by a letter from the Magistrate himself, which has been addressed to the Registrar of this Court in answer to an affidavit filed in this matter by Ram Lall Banerjee, the brother of the petitioner. From that letter and from the register, it appears that the Magistrate of the district, having learnt, shortly after his arrival at the station of Maldah, in a private conversation with the Assistant Magistrate and the Superintendent of Police, that some persons were committing acts which, in their opinion, endangered the safety of a large public embankment, directed some enquiry to be made and followed up that order by himself walking out the next morning in that direction. In the course of his walk, he came upon the petitioner, who was at the time engaged in superintending some work, not on his own account, nor in the capacity of a servant or paid agent, but simply to oblige the owner, the Maharajah of Burdwan; and it appears from the terms of the conviction that, in the opinion of the Magistrate, the defendant had been "proved "conclusively to have cut* away a part of "the slope above the toe for the purpose of "erecting a house, and extending a mango-"garden now belonging to the Maharajah of "Burdwan, for whom he appears to be act-"ing;" and further that the "evidence shows "that a cutting like this, especially in an old "bund, is in the highest degree dangerous, "and cannot be repaired so as to be as strong "as before. A burst on the bund would "sweep the station, the waters of the Bhagi-"rutty pouring over it to join the Maha-"nuddy." And the Magistrate states that in this view of the case it is that he passes a severe sentence. Now, in order to justify a conviction for the offence of mischief, it must appear that the person accused had done a particular act with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person. Doubtless, therefore, if it appeared in this case that the accused knew that the act which he was doing was one likely to cause wrongful loss or damage to the public, or to any person, he would come technically within the meaning of Section 425, although even then he would certainly not justly incur the extremely severe sentence which has been passed by the Magistrate in this case. But it appears to us that the connection between the act done by the accused, and the damage or loss which the Magistrate anticipates, is so remote that it cannot be supposed to have been present in the mind of the accused at the time he did the act. It is impossible to conceive that, if a person engaged in laying out his garden, and making the foundation for a house should, in so doing, encroach slightly on the inner slope of a large embankment, he can be supposed to be doing so with the intention of causing, or with the knowledge that he is likely to cause, wrongful loss or damage to anybody, especially when it is considered that the loss, if any, caused by the act would inevitably fall most severely on the person doing the act himself, because, if the irruption which the Magistrate anticipates should occur in that place, it is the very garden and house in question which would be first exposed to the fury of the waters. This alone is, it appears to us, enough to vitiate the conviction; and if there were nothing more to be said in this case, we should have felt it our duty to annul the conviction and set aside the sentence of the Magistrate, but

* The extent of cutting is not stated.

we think there is more to be said. In this case the complainant or the prosecutor set down is the Government. It does not appear that any information was laid by any person before the Magistrate against this particular petitioner, and the form of the register specifically states that the case was commenced without complaint, and therefore it is to the spontaneous action of the Magistrate himself that these proceedings are to be ascribed. Now, considering that the Magistrate himself was the prosecutor, and himself dealt penally with the case, and considering the important nature of the case in the Magistrate's own view, it appears to us that this was not a case in which he ought to have acted under the summary procedure. It certainly conveys an alarming picture of the insecurity of liberty in these districts, if a person of respectable position, engaged in a perfectly lawful occupation, which happens unfortunately to have an unsuspected tendency to promote danger to the public, should be surprised by the Magistrate in his walk, taken into custody, and, before he has time to turn round, sentenced to rigorous imprisonment for two months. I cannot think that the Legislature intended to authorize summary procedure in such a case as this. These observations apply in precisely the same degree to the case of another petitioner also before us, *viz.*, Pran Nath Shaha. But in his case, there is a still further circumstance. He was also dealt with in the same manner, was surprised in the course of the Magistrate's walk, brought before the Magistrate, and sentenced to two months' rigorous imprisonment; but three days after the conviction had taken place, he appears to have been served with a notice now before us, dated the 24th April, in which he was called upon forthwith to repair the damage which he had done to the public road by taking earth from its sides. Now, considering the proceedings taken, and the extremely severe sentence passed, there appears something like irony in this notice. We can quite understand the Magistrate's zeal for the public good. We can quite understand that, if the Magistrate is informed that a certain practice is dangerous to public security, he should enquire into the matter, give notice to all parties concerned to abstain from such practice, and warn them that any infraction of the notice should be severely dealt with; but it appears to us that to come suddenly upon these persons, take them into custody, and sentence them to rigorous imprisonment, is, to say the least, the exercise of a misplaced rigour. We reverse the convictions in both these cases, and set aside the sentences. We have not entered into the further questions which are discussed in the letter of the Magistrate in answer to the affidavits of Ram Lall Banerjee and Dole Gobind Shaha. They have not been pressed before us to-day by the learned Counsel who appeared for Ram Lall Banerjee, and probably it is unnecessary to go into those questions. We certainly do not think it necessary upon a mere letter like this, to do that which the Magistrate recommends, *viz.*, to direct the prosecution of Ram Lall Banerjee and Dole Gobind Shaha for perjury.

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The 19th June 1876.

Present:

The Hon'ble F. B. Kemp and the Hon'ble F. A. Glover, *Judges.*

Prosecution under Section 521—Nuisance—Slaughtering of kine—Reference to Jury.

(Criminal Jurisdiction.)

In the Matter of

Hadjee Muzhur Ali, Raheem Ali, Nuzzur Ali Budloo, Keramut, and Akrum ...*Petitioners.*

versus

Gundowree Sahoo ...*Opposite Party.*

Mr R. E. Twidale for the Petitioners.

In a prosecution under Section 521, Criminal Procedure Code, it is necessary to show two things: *first*, that the act complained of is a nuisance; and, *second*, that it was committed on a thoroughfare or public place.

Where a Deputy Magistrate had treated the slaughtering of cattle as a "nuisance" under Section 521 of the Criminal Procedure Code, and ordered its discontinuance within a private enclosure belonging to some Mahomedans: HELD that, though the act complained of might be shocking to the prejudices of Hindoos, it could not properly be regarded as a nuisance, and that, at any rate, the act being done in a private place, and not on a thoroughfare, it could not be dealt with under Section 521.

HELD also that the agreement of the accused to refer the matter to a Jury, which had given the case against them, in no way deprived them of their legal rights, or affected the fact that the question of the expediency of discontinuing the alleged nuisance, which had been referred to the Jury, ought not to have been so referred.

Glover, J.—THE petitioners in this case complain against an order made by the Deputy Magistrate of Behar, under Sections 521—526 of the Criminal Procedure Code, directing them to remove a certain building, and to discontinue acts done therein which are declared to be a nuisance.

The petitioners are Mahomedans, and the "nuisance" complained of is the sacrifice by them of kine during the last days of the bukreed—a custom universally prevalent amongst persons of their religious belief. The place where the kine were slaughtered was an enclosed space on land belonging to the petitioners, and situate in the midst of the village of Amla, where both parties reside, and it is not denied that the walls of the enclosure are high, and that no one from the outside can see, or be scandalized by, what takes place in the inside.

The complaint was made by one Gundowree Sahoo, a Hindoo resident of the village, and he added to it a charge of assault against some of the petitioners, in which he was successful, the petitioners being fined Rs. 25 each.

The police were directed to report, and the Inspector stated that the enclosure had been newly erected, and that the killing of kine therein was likely to cause much ill-feeling on the part of the Hindoo community, and would probably lead to a breach of the peace.

On this the petitioners were called upon to show cause why the enclosure should not be removed, and the killing of kine stopped. The petitioner showed cause, stating that the animals were only slaughtered on very special occasions, and only when the rites of Mahomedanism required it; they begged that their religious observances in this particular might not be interfered with, and alleged that no inconvenience or annoyance was caused to the complainants, as a lane passed between their house and the enclosure in question. The petitioners also pointed out that in many other places sacrificial offerings of this kind were carried out without objection being made by any one. They also desired to give evidence on all these points.

The Deputy Magistrate then nominated a Jury; the petitioners say they were pressed by the Deputy Magistrate to ask for a Jury; but.

however this may be, a Jury was appointed, the petitioners naming two of the Jurymen, and the Jury were directed to proceed to the spot, and then give an opinion whether the petitioners should be allowed to sacrifice kine there.

The Jury reported unfavorably to the petitioners and the Deputy Magistrate thereupon ordered them to remove the nuisance, *i. e.*, to cease from slaughtering kine within the enclosure.

Now, the Section (521) under which the Deputy Magistrate proceeded gives power to remove a nuisance or an obstruction from "any thoroughfare or public place," and there were, therefore, two things necessary to be shown before the Deputy Magistrate could take action under the Section: First, that the act complained of was a "nuisance;" and, secondly, that it was committed in a thoroughfare or public place.

That Hindoos should object with all their strength to the killing of cows in an enclosure situated within a few yards of their dwelling is natural enough, but this would not make such killing a nuisance in the legal sense of the term. The animals were sacrificed within a walled enclosure, no one could see the process from the outside, and it is not alleged that the sacrifices were made occasion for noisy or riotous demonstrations which could affect the comfort of the neighbours. It was simply and solely a matter of religious feeling. The complainant had no objection to other animals being sacrificed within the enclosure in question; he even suggested that the petitioners might kill sheep or camels there if they liked—what he objected to was the slaughter of the sacred cow.

A Mahomedan might just as well object to the building of a Hindoo temple near his premises, and perhaps with more reason, for the noise attendant on the performance of Hindoo religious ceremonies might well amount to an annoyance if not to a positive nuisance; but I do not suppose that a Mahomedan so complaining would induce a Magistrate to bring the case under Section 521.

The fact is, that all concerned in this case have looked at the matter through Hindoo spectacles. The Police Inspector was a Hindoo, and the Deputy Magistrate was a Hindoo, and with all the good-will in the world to hold the scales of justice even, it was hardly possible for them not to be biased against allowing what must have seemed to them a horrible profanity and wickedness. The Jury, too, were not told to declare whether the act complained of operated as a nuisance, but whether or not it was expedient that it should be stopped—a matter which ought not to have been before them at all.

I am of opinion, therefore, that the act charged against the petitioners was not a nuisance. But admitting that it was a nuisance, that does not carry the case much further. The Section says that the nuisance must be committed in a thoroughfare or public place, and it is quite clear from the record that this slaughtering of kine was not done either in a thoroughfare or in a public place. It was carried out in the midst of a native village within a private and high walled enclosure. It seems to me that the Deputy Magistrate's order was bad on this ground.

But it may be said that the petitioners, by agreeing to the appointment of a Jury, admitted that there was a *primâ-facie* nuisance, and are now bound by the verdict. I do not think that any mistake on the part of the petitioners, who appear to be ignorant villagers, would give the Deputy Magistrate power to proceed under Section 521, if the act complained of did not come within the purview of that Section. If it was not a nuisance committed in a thoroughfare or public place, then the Deputy Magistrate had no power to call

upon the petitioners to stop it, or to show cause why they should not stop it, nor was there any occasion to appoint a Jury or Authority to take their verdict.

I am of opinion that the order of the Deputy Magistrate is bad in law, and should be quashed—of course, this refers only to the order made under Section 526, and not to the fine imposed or the assault.

Kemp, J.—I concur.

The 8th September 1876.

Present:

The Hon'ble Sir Richard Garth, *Kt., Chief Justice*, F. B. Kemp, and E. G. Birch, *Judges.*

Breach of the peace—Possession—Section 530, Criminal Procedure Code—Symbolic possession—Error in law—Section 297, Criminal Procedure Code.

In the Matter of

Sheikh Munglo and Peer Khan, *Petitioners,*

versus

Durga Narain Nag, *Opposite Party.*

Where a police-officer reported that there was a probability of a breach of the peace arising in consequence of a dispute about the possession of some land, and the Magistrate endorsed an order on the police-report, calling on the Court inspector to summon the parties, without having recorded a proceeding, expressing his satisfaction with the grounds on which a breach of the peace was apprehended; and it was contended by the party, in whose interests the order finally passed by the Magistrate was made, that the fact of the passing of the order embraced the necessary conviction: HELD, following the current of decisions on the point, that, in order to justify a Magistrate in interfering with public rights under Section 530 of the Criminal Procedure Code, it was necessary, not only that he should be satisfied upon sufficient grounds that a breach is likely to occur, but that he should acquire a jurisdiction to deal with it by first recording a proceeding expressing his opinion on the subject; and that the omission to record such a proceeding is not a mere irregularity, but a substantial defect lying at the root of the Magistrate's jurisdiction.

Section 297 of the Criminal Procedure Code, which gives the High Court power to correct any material error in any judicial proceeding of a subordinate Court, refers to errors in law, and not to errors in findings of facts.

HELD also (*Kemp, J.*, dissenting) that, although symbolic possession is not entitled to weight as against a party proved to be in possession, yet, in the absence of evidence, it is in itself deserving to be taken into consideration.

Garth, C. J.—IN this case a rule was obtained, on the 26th of May last, calling upon Durga Narain Nag to show cause why an order of the Deputy Magistrate of Howrah, dated the 15th of February 1876, purporting to be made under Section 530, Criminal Procedure Code, should not be set aside.

This rule was obtained upon two principal grounds:—

1st.—That no preliminary proceeding, as required by the Section, had been recorded by the Magistrate; and

2ndly.—That the evidence adduced on the part of Durga Narain Nag was not sufficient in law to justify the Deputy Magistrate's order in his favor.

This rule was argued first before my learned colleagues, Mr. Justice Kemp and Mr. Justice Birch; but as they were divided in opinion, it became necessary that the case should be heard before a third Judge, and it was accordingly re-argued before these two learned Judges and myself. The facts were these:—

On the 27th October 1875, the Inspector of the Howrah Police Office forwarded to Mr. Reily, the Superintendent of the Howrah Police, an extract from his Diary in these words:—

"Extract from Howrah Diary, dated 27th "October 1875, No. 5229, 6 P. M.—Inspector "and Head Constable Waris Mahomed re-"turned after visiting Tindal Bagan, where "there was a likelihood of a riot taking place, "and to prevent which two constables, in addi-"tion to the one on duty there, were placed. "The riot seems likely to take place, as the "land has recently been purchased by one "Durga Churn Nag. So I was informed,

and deposed to by one Peer Shaw, who, as he says, has had the ijarah of the said land heretofore. Durga Churn Nag's Gomasta, Moonsoor Ally, is erecting a hut, which seems to be the primary cause of this disturbance. Under these circumstances, I think it would be advisable to bind both sides down to keep the peace."

This extract was annexed to a letter from the Inspector to Mr. Reily, in which he gave the names of the claimants to the land in Tindal Bagan, and recommended that these parties should be bound down to keep the peace. This letter and extract were sent by Mr. Reily, the Superintendent, to the Magistrate, with the following note endorsed:—

"Respectfully submitted for orders of the Magistrate. There is likelihood of a breach of the peace in Tindal Bagan again. Begs the men named be bound down to keep the peace."

On the back of the Inspector's report, the Magistrate, on the same day, made the following orders:—

"Serve a notice on Durga Churn to at once cease from building the hut under Section 518, Criminal Procedure Code. And call on both parties to appear before me this day week with their documents, that I may determine under Section 530, Criminal Procedure Code, who is in possession of the disputed land.

T. GRANT,
M.

"*The 27th October 1875.*"

Upon this, a notice was issued under the seal of the Magistrate's Office, signed by the Magistrate himself, of which the following is a translation: "To the Court Inspector of "the Criminal Court of the District of "Howrah. The two parties mentioned "below having entered into a dispute in "respect of certain land belonging to the "Tindal Bagan within the jurisdiction of the "Station of Howrah, in connection with the "building of a house, and a breach of the "peace being likely, the 3rd day of November "next, Wednesday, has been fixed for "the trial (of the case) under Section 530 "of the Criminal Procedure Code, and two "notices (itlanamahs) in the names of the "two parties mentioned below are forwarded "to you; and it is ordered that you will "serve them in the usual way before the day "appointed (for the hearing), and submit the "receipts. The 27th October 1875.

"*First party.*	"*Second party.*
"Durga Churn Nag,	"Peer Khan,
"Moonsoor Ally, and	"Sheikh Munglo,
"Roushan Ally.	Doctor, and
	"Meer Sirdar Ally.

"*All residents of Tindal Bagan.*"

Notices were accordingly served upon the two parties mentioned in the notice; and after considerable delay, the case was heard before the Deputy Magistrate in the commencement of the present year.

Evidence was given on both sides, chiefly of a documentary character; and the Deputy Magistrate eventually decided that Durga Narain Nag was the party in possession at the time when the proceedings commenced, and accordingly made an order in his favor.

The case has been very fully and ably argued before us by the Advocate-General against the rule, and Mr. M. M. Ghose in support of it; and we have been referred to a number of authorities upon both the points raised by the rule. After taking time to consider our judgment, I have come to the conclusion that, upon the first ground mentioned in the rule, the Deputy Magistrate's order is bad, and must be set aside. It was argued by the Advocate-General that the report of the Inspector of Police disclosed, upon the face of it, sufficient grounds to satisfy the Magistrate that a dispute between these parties had actually commenced, and that a breach of the peace

was likely to ensue; and that the order of the Magistrate upon this report must be taken to mean that the Magistrate was satisfied of the truth of the report, and that, upon the grounds stated in that report, a breach of the peace was imminent. He further argued that, even assuming the order of the Magistrate to be insufficient to satisfy the Section, the notice served upon the Court Inspector and signed by the Magistrate was of itself a sufficient record of a proceeding to cure any previous defect. It is undoubtedly of the utmost consequence that some settled rule should be laid down upon this subject, and it appears to me that, when the cases are properly considered, the weight of authority does, in fact, lay down such a rule. It is clear that the Legislature never intended that a Magistrate should interfere between rival claimants of land in a summary way, and place one party in possession to the exclusion of the other, unless the preservation of the public peace render such interference absolutely necessary. However serious the dispute may be between the claimants, and however desirable the Magistrate may consider it to settle that dispute, he has no right to interfere, *unless a breach of the peace is imminent.* The Section, therefore, requires that, before he takes any steps to bring the parties before him, he must first satisfy himself upon sufficient grounds that there is likely to be a breach of the peace; and in order to secure this, and to satisfy the Court whose duty it is to supervise his proceedings, that he has a right to interfere under this Section, he is bound to record a proceeding, stating the grounds upon which he is satisfied that a breach of the peace is likely to arise. The recording of this proceeding has been held in a long series of decisions, and I consider quite rightly, *to be the foundation of the Magistrate's jurisdiction;* and until he has taken this step, he has no right whatever to interfere with the parties' civil rights, or to take any further steps to summon them before him. Now, let us see what has been done in this case. The Magistrate, in the first instance, simply endorses an order upon the back of the police-report, that a notice should be given to the parties under Section 530 to make their claims before him by a given day. He records no proceeding, showing that he believes the report of the Inspector, or any, and which portion of that report, or that he is satisfied that there is a likelihood of a breach of the peace; and, therefore, in making the order, he is, in fact, taking steps to bring the parties before him, without having first recorded the necessary proceeding. But then it is said that the order itself implies that he believes the report, and shares in the apprehensions of the police, and that we ought to infer this from the very fact of his making the order. It is obvious, however, that, if we were to give the order this extended meaning, we should be entirely defeating the intention of the Legislature. The fact of the order being made induces no *necessary* inference that the Magistrate believed the report; and it is perfectly consistent with the contrary supposition that he disbelieved the whole or the greater part of the police-report, and had no real apprehension of a breach of the peace, but that he considered it very desirable to settle the dispute himself between the contending parties. The truth is, that nothing ought to be left to *inference* in such a case. The requisite statement by the Magistrate should be made clearly and unmistakeably before he is allowed to interfere in any way with the civil rights of landowners. I will now proceed to examine the authorities upon the subject. The first is a decision of Kemp and Glover, JJ., in 2 W. R., Cr., 31, in which it was held generally that, before a Magistrate could call upon parties to attend before him under Section 318 of the old Criminal

Procedure Code (which is similar in its terms to Section 530 of the present Code), he was bound to record a proceeding, stating his grounds for being satisfied that a breach of the peace was likely to occur. This case was followed by a decision by Kemp and Seton-Karr, JJ., in which the Court distinctly laid it down that the omission to record the proceeding *was not a mere formality of procedure*, but rendered the whole of the subsequent proceedings illegal (4 W. R., Cr. R., 26). The next case was heard before Jackson, Phear, and Glover, JJ., and is reported in 5 W. R., Cr., 14, in which the question arose, whether a Magistrate's omission to record, in a separate statement, his reasons for believing that a breach of the peace was likely to occur, was sufficient to nullify subsequent proceedings taken by him under Section 318. In that case Mr. Justice Glover considered that the fact of a Magistrate having endorsed a police-officer's reasons for apprehending a breach of the peace, by ordering an enquiry under Section 318, was (although a culpable way of performing his duty) sufficient to prevent the Appellate Court from annulling his order for illegality. But Phear and Jackson, JJ., were of a contrary opinion. Both these learned Judges expressed a strong view that a Magistrate has had no jurisdiction to enquire into the question of possession at all, unless he is first satisfied that a breach of the peace is likely to occur, and unless the fact that he is so satisfied is stated upon the record. Another decision to the same effect by Phear and Hobhouse, JJ., is reported in 9 W. R., Cr. 64. The next was a case closely resembling the present, reported in 3 B. L. R. 76,[1] decided by Norman and Kemp, JJ., in which most of the previous decisions were considered. It appears in that case that a report had been made by the police, that a very serious riot might take place with respect to a boundary-dispute which might lead in the future to violence, if not murder. The Magistrate upon this made an order endorsed on the report, precisely as he did here, fixing a particular day for the hearing of the parties under Section 318; and the question arose, whether that was a sufficient record of a proceeding within the meaning of Section 318, and the Court held that it was not; and upon that ground the Magistrate's proceedings were set aside. It is true that in that case the report made by the police was itself of a very unsatisfactory character, but the ground upon which the Court proceeded was the fact that the Magistrate had recorded no proceeding within the meaning of Section 318. The next decision is in 9 B. L. R. 229,[1] Sir Richard Couch and Mr. Justice Ainslie. In that case an objection was taken that the Magistrate had not recorded a proceeding under Section 318, and Sir Richard Couch, in delivering the judgment of the Court, says: "That a compliance with the provi-"sions of Section 318 is requisite, and "that an omission on the part of the "Magistrate to record a judgment, such as "is required by that Section, renders the "proceedings illegal, was decided in Harvey "*vs.* Brice, 4 W. R., 26" (the case to which I have already referred); and he then proceeds to cite with approbation the judgment of Mr. Justice Phear in 5 W. R. and in 9 W. R., so far as regards the particular point which is now under consideration. This long current of authorities, as well as others to the same effect, to which I do not think it necessary to refer, seems to show a very strong consensus amongst the Judges of this Court for many years past, that, in order to justify a Magistrate in interfering with private rights under Section 318 of the old Code, and Section 530 of the new Code respectively, it is necessary, not only that he should be satisfied upon sufficient grounds that a breach of the peace

[1] Also reported in 15 W. R., Cr., 42.

[1] Also reported in 18 W. R., Cr., 11.

is likely to occur, but that he should record a proceeding to that effect. There are, however, two or three cases which I think it right to notice, which appear, at first sight at least, to conflict with this view, and which are the more difficult to explain, because they are decided by the same Judges who had previously laid down the law in the cases which I have already cited.

The first of these is a case decided by Chief Justice Couch and Mr. Justice Ainslie in 22 W. R., Cr., 81. In that case it appears that the applicant before the Court was summoned to answer a charge of criminal trespass; and upon both parties coming before the Magistrate, it appeared that the question between them had reference to a dispute about some land. The Magistrate then, without (so far as appears) there being any likelihood of a breach of the peace, and without taking any steps to justify him in proceeding under Section 530, appears to have then and there gone into the question of possession between the parties under that Section, and to have decided against the applicant. The Magistrate, as far as I can see, had no right or jurisdiction whatever to deal with the case under Section 530; but the learned Judges dismissed the application, apparently upon the ground that the omission to take proper steps to bring this case under Section 530 was a mere irregularity which was cured by Section 283 of the Criminal Procedure Code This case is very imperfectly reported, and it may be that facts were disclosed at the hearing which do not find their way into the report, and which induced the learned Judges to refuse the application; but this decision certainly appears to be at variance with the rule which had been previously laid down in several decided cases; and which was cited with approbation by Sir Richard Couch and Mr. Justice Ainslie in the case in 9 W. R., to which I have referred. A mere irregularity would never (quite irrespective of Section 253 of the Code) ha afforded any good reasons for setting aside Magistrate's order which appeared to ha been made upon just grounds, and the v point which was decided in previous ca was that the omission to record a proceedi was *not a mere irregularity*, but a substan defect which no subsequent adjudication co supply. In another case reported in 6 W. Cr., p. 4, Mr. Justice Jackson sitting alo appears also to have decided that a rep by a Police Inspector, endorsed precisely the Magistrate has endorsed the report this case, was a sufficient record of t proceedings to satisfy the statute; but t case seems to have been decided witho argument, and the learned Judge's attenti was not directed to the previous authoriti to some of which he was himself a part which, as it seems to me, conflict with h decision in that case. The last authority up this subject, to which I shall refer, is report in 24 W. R., Cr., 17. Then an applicati had been made to a Magistrate calling up Duriao Singh and others to give recognizan to keep the peace. Upon the parties appe ing before him, the Magistrate dismissed t application; but finding that the dispute w with reference to some land, he dealt with t case in a summary way under Section 53 and directed possession of the land to b retained by one Killan Singh. Here, agai the Magistrate, as far as appears, had no rig whatever to interfere between the parties. H took no steps to acquire a jurisdiction und Section 530; and so far from its appeari that any breach of the peace was imminent, t seems to have dismissed the application for recognizances. The learned Judges in that case seem to have lost sight of the rule, which had been so distinctly laid down in the previous authorities, that, in order to found a jurisdiction under Section 530, it is indispensable that the preliminaries enjoined by the Section should be strictly observed.

I am of opinion, therefore, in accordance with what appears to be the strong weight of authority on this subject, that, in this case, the endorsement of the Magistrate's order on the Inspector's report was not a sufficient compliance with the Section; and I am further of opinion on the same ground that the notice to the Inspector, which was a good deal relied upon by the Advocate-General, does not cure the defect. That notice was itself a part of the proceedings which the Magistrate had no right to take until he had first recorded the statement which was the root of his jurisdiction. The other point which we are called upon to decide is, whether the evidence offered in the case on behalf of Durga Narain Nag was sufficient in law to justify the Magistrate's decision. It was argued in the first instance by Mr. Ghose that he was at liberty, under this ground of objection, to go generally into the question whether the Deputy Magistrate had not come to an erroneous conclusion upon the facts. He pointed our attention to the difference between the language of Section 405 of the old Criminal Procedure Code and that of Section 297 of the present Act, which gives the High Court power to correct *any material error in any judicial proceeding* of a subordinate Court; and he contended that "material error" in that Section meant error in fact, as well as error in law. It has been held, however, by Markby and Birch, JJ., in 20 W. R., Cr., 40, that, notwithstanding this difference of language between the two Sections, the High Court can only deal with *errors of law apparent* upon the proceedings, and has no power to inquire whether the Magistrate has rightly decided a question of fact. This point, no doubt, is a very important one; and it is possible that, at some future time, it may have to be submitted to a Full Bench; but in this particular instance it is clear that the rule which was obtained by Mr. Ghose distinctly confines his objection to the insufficiency of the evidence in *point of law*. Upon this he contended, as he had a right to do, that there was no evidence at all before the Deputy Magistrate which justified him in deciding in Durga Narain's favor. Now, the only evidence of present possession on the part of Durga Narain Nag was this. Mr. Sykes, the agent of Dr. Jones, who held a tenement forming a part of the disputed property, says that, in July and August 1875, he paid the rent of that tenement to Durga Narain Nag. It is clear that this is some evidence of the possession of Durga Narain Nag to so much of the property, at any rate, as was occupied by Dr. Jones. Another witness states that, in the month of November, shortly after the Magistrate had issued the notices on the claimant, he the witness paid the rents due for another portion of the property for the period between April 1875 and the month of November, when the payment was made. It seems difficult to say that this payment also is not some evidence of possession by Durga Narain Nag previously to the commencement of the proceedings. There seems, however, to be a conflict of authority as to this, and it is not necessary to determine the point here, because there is another piece of evidence, which appears to me to justify the Magistrate's *finding in point of law* with regard to the whole of the property. Durga Narain Nag purchased the right, title, and interest of Rowshun Ali in the whole of the land in dispute at an execution-sale in the month of October 1874; and in April 1875, symbolical possession of the whole was duly awarded to him in the usual way by the officer of the Court. Now, it is quite true that, as against a party who is proved to be in the actual possession of the rents from the ryots, the fact of such symbolical possession would

not be entitled to much weight; but it is impossible to say that it is not some legal evidence of possession which the Magistrate was bound to take into consideration. Suppose, for instance, that, upon both parties coming before the Deputy Magistrate, the only evidence offered on either side was, that symbolical possession had been given some months before to one of the parties. The Deputy Magistrate would surely be bound to find in favor of that party; and he would clearly not be justified in disregarding that evidence, and ordering the property to be attached as upon a vacant possession. This appears to me to be a conclusive test as to whether, in this instance, the evidence before the Deputy Magistrate was sufficient *in point of law* to justify his decision. The conclusion, however, at which the majority of the Court have arrived upon the first question will decide this case. The rule to set aside the Deputy Magistrate's order in favor of Durga Narain Nag must be made absolute.

Kemp, J.—I quite concur in the judgment just delivered by the learned Chief Justice with reference to the question whether there has been a sufficient proceeding to meet the requirements of Section 530 of the Criminal Procedure Code. But I regret to say that I differ from him on the second question, namely, the question of possession. In the Weekly Reporter, Volume XVI., Criminal Rulings, page 13, there is a passage in the judgment of Mr. Justice Paul, which, I think, precisely fits this case. The learned Judge there observes: "That, when we consider that an award under Section 318 (now 530, the two Sections being precisely similar) gives a man a strong hold upon land from which he cannot be dispossessed until the opposite party can prove a superior title, it cannot but be maintained that the proper proceeding must be that the local enquiry or investigation, of whatever nature it may consist, should be upon evidence in the legal sense of the word," that is to say, upon evidence properly so called. Now, applying this test to the case before us, I am clearly of opinion that there is no evidence in this case which can profess to be evidence in the legal sense of the word or evidence properly so called. Durga Narain Nag purchased the rights and interests of Rowshun Ali on the 5th of October 1874. The certificate of sale is dated the 14th of December 1874. Symbolical possession under Section 264 of the Code took place on the 3rd of May 1875, the Naib Nazir of the Civil Court proclaiming to the ryots by affixing a copy of the sale-certificate in a conspicuous place that the right, title, and interest of Rowshun Ali had been transferred to the purchaser Durga Narain Nag. Now, such symbolical possession would be no evidence such as the Magistrate could proceed upon in enquiring and deciding which party is in actual possession of the subject of dispute. The law says that a Magistrate shall, without reference to the merits of the claim of any party to a right of possession, proceed to enquire and decide which party is in possession of the subject of dispute. Moreover, I find that, after this symbolical possession, that is, on the 24th of July 1875, there was a proceeding in the Civil Court of Zillah Hooghly before Mr. Ward, the then Officiating Judge of the district. In that case Ashootosh Dhur, the decreé-holder, Durga Narain Nag, the auction-purchaser, and Mungloo Doctor, one of the petitioners before us, were parties. And the learned Judge, who decided the case, remarked: "It is not pretended that a *bansgaree*, that is, symbolical possession, took place on the very land which is the subject-matter of this claim," *viz.*, the claim of Mungloo Doctor before him; and Mungloo Doctor's claim before the Officiating Judge of Hooghly referred, if not to the whole, to a portion of the very land which is the subject

dispute before us. Then with reference to witnesses who were examined as to the of actual possession at the time of dis-e, Mr. George Sykes, of the Firm of ssrs. Sykes & Co., as agent of Mr. kes, who held only 11 cottahs of d in the disputed area, No. 24 on the p, states that he used all along to pay t, including taxes, first to Abdul Hameed, d afterwards to Saheb Jan and Mehur Jan ehur Jan is the vendor of Mungloo octor); that he subsequently paid rent for y and August to Durga Narain Nag; and t, since the institution of the suit, that since the dispute commenced, he has not id rent to any body. Therefore, assuming at all that this witness stated was perfectly ue, he does not say that he was paying nt to Durga Narain Nag at the time the spute arose, which was in October 1875. he other witness is Ootum Karinda, a shop-eeper, residing in Howrah. He says that he holds three jummas, that is, three holdings; and that he executed three kubooleuts for them, which have been registered in favor of Roma Nath Roy. Now, Roma Nath Roy is the lessee of Mehur Jan, whose rights have been purchased by Mungloo Doctor. The witness further deposes that in Aghran last he paid to Durga Narain Nag, after receiving some remission, the rent due from Bysak to Aghran. This payment was made subsequent to the dispute. Therefore, this witness's evidence can be no evidence of actual possession by Durga Narain Nag of the disputed land at the time the dispute arose. I, therefore, am of opinion on both grounds, not only because no proceeding under Section 530 has been recorded, but also because there is no legal evidence on which the Deputy Magistrate could come to the finding at which he has arrived in this case, that his order should be set aside, and the rule made absolute.

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uctions to be observed in the preparation of Annual Statements, Judicial (Criminal) s. 2, 3, and 4.

CIRCULAR MEMO. No. A.

ated Calcutta, the 15th January 1876.

ALL CRIMINAL AUTHORITIES.

HIGH COURT.

English Department.

(Criminal.)

HE following instructions should be erved in the preparation of the Judicial iminal) Statements Nos. 2, 3, and 4.

. The total number of persons shown Statement No. 2, as "acquitted or dis-rged" (column 4), should agree with the l of the corresponding columns (9 and 10) Statement No. 3, and the persons "con-ed" (column 5) according to the former tement should agree with those shown in umn 11 of the latter Statement, care being en to include in the comparison the figures under "Sessions Courts" in Statement No. 3. The same remark applies to the columns headed "died, escaped, transferred," and "remaining under trial" at the end of the year.

3. The number of *committed* persons shown in the column of remarks, Statement No. 2, should always correspond with the number shown in Statement No. 3, as "remaining at the end of the year" *before the Sessions Court*, unless there is a sufficient reason for a discrepancy, which should be stated.

4. In calculating the duration of a case with a view to filling up column 15 of Statement No. 3, the starting point to be taken is not the date of "complaint" or "information," but that of *apprehension* or *attendance on summons;* paragraph 4 of Circular Order No. 3, dated 2nd February 1871, having been superseded by later orders (*vide* Circular Memo. No. 1, dated 8th January 1873, and Circular Memo. No. 2, dated 28th February 1873), which show the reason of the alteration, *viz.*, that the information relates to *persons* "brought to trial" within the meaning of columns 3 to 6, Judicial Statement No. 3, and not to *cases* in the abstract where a complaint is merely made or information laid.

5. Accordingly, a general return should be made at the close of each year by the District Magistrate, and submitted to the High Court with the Annual Statements of the same nature as the monthly return prescribed by Circular Memo. No. 1, dated 8th January 1873. Similar information should be added with reference to the Sessions Courts, *mutatis mutandis*, that is to say, the *actual* number of days occupied should be given, commencing from the date of commitment, without distinguishing cases in which the agency of the police has been employed from those in which it has not.

6. Where the aggregate of the smaller columns 1 to 15 (excluding columns 9 to 11) of Judicial Statement No. 4 falls short of the number of convictions given in Statements Nos. 2 and 3. the difference should be accounted for by reference to Chapters 39. 40, and 41* of the Criminal Procedure or otherwise, as the case may be.

7. To save calls for explanation, the Sessions Judge should see that the aggregate number of persons fined, imprisoned, or whipped corresponds exactly with the details under those heads respectively in Statement No. 4.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Instructions to be observed in the preparation of the Annual Statements, Judicial (Civil) Nos. 6, 8, and 9.

CIRCULAR MEMO. No. A.

Dated Calcutta, the 12th January 1876.

HIGH COURT.

English Department.

(Civil.)

THE following instructions should be observed in the preparation of the Annual Statements for 1875 and subsequent years:—

2. In Judicial Statement No. 6, the *total* number of suits instituted in each class of Courts should be shown in a column to be inserted at the end of the columns of figures; the *grand total* of all the above totals being shown at foot; and wherever the total under any head in the new column differs from the total under the corresponding head in Statement No. 8, the cause of the discrepancy should be explained in the column of remarks in Statement No. 6.

3. In Statement No. 8, the work of those Moonsiffs who have been invested with Small Cause Court powers under Section 29, Act VI. of 1871, performed in the exercise of those powers, should be shown separately from their work as Moonsiffs; both kinds of cases being exhibited opposite "Paid subdivisional tribunals," and bracketed together.

4. To enable the Court to have columns 19 and 20 filled up, it is not enough that each local return exhibits the average duration of cases under each class of Courts. What is wanted for the Court's return to the Government of India is a general average for each grade of Courts in all districts, and to effect this, it is necessary to have from each district the *actual* number of days occupied in the trial of cases, from date of institution to date of disposal, and the actual number of cases disposed of. This information should be given separately under each head, "contested" and "uncontested."

5. In Statement No. 9, under the head "Chief Appellate Court of District," the designation *Revenue Appeals* must be taken to include all Appeals in rent-cases, *i.e.*, cases decided by the Civil Courts under Act VIII. (B. C.) of 1869, wherever that law is in operation.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

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* Local nuisances, possession, and maintenance of wives and families.

Strength of Civil Court Ameen establishments regulated by work.

CIRCULAR ORDER No. 1.

Dated Calcutta, the 15th January 1876.

HIGH COURT.

English Department.

(Civil.)

COPY forwarded to all District Judges. Their particular attention is directed to the responsibility which has been imposed upon them.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Resolution of the Government of India, Financial Department, No. 3020, dated Simla, the 31st August 1875.

READ—

Endorsement of the Government of Bengal, No. 2328, dated the 20th July 1875, on a letter from the Registrar of the High Court in Bengal, submitting a statement of receipts and disbursements on account of the employment of Ameens in the several Civil Courts during the year 1874-75.

RESOLUTION.—The Governor-General in Council observes that, adding 10 per cent. for pensions, the receipts and charges on account of the employment of Civil Court Ameens in 1873-74 and 1874-75, and the deficit in each of these years, are as follows :—

	Receipts Rs.	Charges Rs.	Deficit. Rs.
1873-74 ...	63,473	78,509	15,036
1874-75 ...	52,700	72,587	19,887

The measures taken by the High Court upon the return of 1873-74 do not appear to have proved effectual. The receipts of 1874-75 have fallen off largely compared with 1873-74. His Excellency in Council accordingly considers that District Judges should be held responsible for the timely and systematic adjustment of their establishments in accordance with the work which they have to do.

ORDER.—Ordered, that a copy of the foregoing Resolution be forwarded to the Home Department for information and for the issue of further necessary orders.

R. H. HOLLINGBERRY,

Asst. Secy. to the Govt. of India.

Form of application for certificate of administration.

CIRCULAR ORDER No. 2.

Dated Calcutta, the 28th January 1876.

HIGH COURT.

English Department.

(Civil.)

IT is ordered that every application for a certificate under Act XL. of 1858 shall be in the form appended hereto, with such variations as the circumstances of each case may require ; and that the certificate shall in every case show the date on which it will cease to have effect.

IN THE CIVIL COURT OF THE DISTRICT OF———.

To

ESQ.,

District Judge of———

Dated the of 18 .

The humble petition of ,

son of ,

resident of

District :

SHEWETH.

That A B, son of C D, resident of , District , is entitled to the property specified in the schedule hereunto annexed and marked A (*or to a one-fourth share thereof, or as the case may be*), as the son and heir (*or as one of the four sons, or as the case may be*) of E F, deceased (*or as a legatee under the will of* E F, *deceased, or under a deed dated and made by* E F, *or state how otherwise*).

That the value of the said property (*or of the said* A B's *share therein*) is correctly set forth in the said schedule A.

That the said A B is a minor, being of the age of years, months, and days.

That your petitioner is (*state the degree of relationship to, or connection with, the minor, or how otherwise the petitioner claims to be entitled to have charge of the minor's property*)

That your petitioner, as such next of kin (*or state how otherwise*), claims to have charge of the said property in trust for the said A B during his minority.

That your petitioner, therefore, prays that a certificate of administration under Section 3 of Act XL. of 1858 may be granted to him.

And your petitioner as in duty bound, &c.

I, , the petitioner named in the above petition, do solemnly affirm that what is stated therein is true to the best of my information and belief.

(Signature of Petitioner.)

Solemnly affirmed this day of 18 , before me.

District Judge.

Attachment or withdrawal of attachment in execution to be notified to Collector of District.

CIRCULAR ORDER No. 3.

Dated Calcutta, the 8th February 1876.

HIGH COURT.

English Department.

(Civil.)

THE attention of Judges of every grade is drawn to Circular Order No. 2, dated 10th January 1871, requiring orders of attachment to be notified to the Collector of the District in which the attached estate, or share of estate, is situated, and they are requested to observe that the notification is to be made in every case, without exception, in which such property is attached in execution of a Civil Court's decree. The above notification does not, however, supersede the written order which is required by Section 239, Civil Procedure Code, to be fixed up in the office of the Collector when land, or any interest in land, is attached.

2. The Court is also pleased to direct that, whenever attachment is legally and formally withdrawn, such withdrawal shall, in like manner, be notified to the Collector in all cases of the same description.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Seals and signatures of Judicial Officers and name of Court issuing processes to be clearly rendered.

CIRCULAR ORDER No. 4.

Dated Calcutta, the 13th March 1876.

HIGH COURT.

English Department.

(Civil and Criminal.)

IT has been brought to the notice of the Court that it frequently happens, in the case of process issued in one district for service or execution in another, that the seals and signatures on the process are illegible, whereby great inconvenience and delay are caused.

2. It is also necessary and right that, in every sentence or order made by a Criminal Court, the jurisdiction of the Judge or Magistrate making it should distinctly appear on the face thereof.

3. The Court is, therefore, pleased to direct that in every process and every sentence or order (of whatever description) issued by a Judicial officer for whatever purpose it may be issued or made, the name of the District and of the Court from which the same is issued, and also the name and powers of the Officer issuing or making it, shall be clearly set out in such manner that it may be easily read.

4. The Court further directs generally that in all cases all Judicial Officers shall take care to sign their names distinctly and legibly.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Stamping documents after execution—Prosecution.

CIRCULAR ORDER No. 5.

Dated Calcutta, the 25th March 1876.

HIGH COURT.

English Department.

(Civil.)

AT the instance of His Honor the Lieutenant-Governor, the Court desires that, in all cases in which the Civil Courts find any document which comes before them to have

on stamped after its execution in contravention of law, they will give a copy of their judgment to the Government Pleader with a view to the prosecution, if necessary, and the Revenue Authorities of the parties concerned in such after-stamping.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Instructions for preparation of Annual Report by Judges on civil justice.

GENERAL LETTER No. 1.

Dated Calcutta, the 21st January 1876.

HIGH COURT.

English Department.

(Civil.)

THE following instructions should in future be observed by District Judges in the preparation of their Annual Reports on the administration of civil justice required by Circular Order No. 4, dated 2nd February 1871.

2. The results shown in the 3rd Table of the report, *viz.*, that which is intended to show the "number and value" of suits commenced, frequently differ, not in the aggregate, but in details, from the figures in Judicial Statement No. 6. To obviate such discrepancies, the Court desires that, in the distribution of cases into the three classes named on the margin, local officers may be guided, in respect both of the Tabular Statement No. 3 and the judicial Statement No. 6, by the principles laid down in Circular Order No. 25, dated 30th December 1873.

Suits of Small Cause Court class; rent suits; other suits.

3. Table 4 showing "miscellaneous cases of a judicial nature other than regular suits or proceedings in execution," *disposed of and pending*, should also be made to show miscellaneous cases *instituted*.

For this purpose, a double column should be inserted before the column "disposed of," with a view to the exhibition of a comparative return for two years of the institutions in question.

4. A similar double column will need to be inserted in the table of miscellaneous appeals, whenever this is not done already.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Portion of Circular Memo. No. 3 of 1st February 1873 rescinded.

GENERAL LETTER No. 3.

Dated Calcutta, the 17th February 1876.

HIGH COURT.

English Department.

(Civil.)

THE Court is pleased to rescind so much of paragraphs 3 and 4 of Circular Memo. No. 3, dated 1st February 1873, as requires the separate exhibition in the Quarterly Civil Statements of the work of Subordinate Judges and Moonsiffs vested with the jurisdiction of a Court of Small Causes under Section 29, Act VI. of 1871, performed in the exercise of that jurisdiction, such work being now shown in a separate statement.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

g.

Cases struck off on plaintiff's default entered as "otherwise disposed of" in Quarterly Returns.

No. 295.

FROM

W. M. SOUTTAR, ESQ.,

Regr., High Court of Judicature at Fort William in Bengal,

To

THE JUDGE OF BHAUGULPORE.

Dated Calcutta, the 17th February 1876.

HIGH COURT.

English Department.

(Civil.)

SIR,

I AM directed to acknowledge the receipt of your letter No. 32, dated 10th February 1876, relative to the mode of exhibiting in the Quarterly Civil Statements cases dismissed on default of plaintiff's prosecution of them, and in reply to state that the Court approves of their being accounted for not as decided "on trial," but as "otherwise disposed of."

2. According to the Code of Civil Procedure, no doubt (this being a *casus omissus*), these decisions cannot come under the head of dismissal on default; but neither, manifestly, can they be said to be decisions on trial, where the plaintiff, having to prove a case, has given no evidence. The Court's Statements are meant to show work done, and ought not, by reason of an omission in the Code, to be made to supply misleading information.

I have, &c.,

(Sd.) W. M. SOUTTAR.

Registrar.

GENERAL LETTER No. 4.

Dated Calcutta, the 17th February 1876.

HIGH COURT.

English Department.

(Civil.)

FORWARDED to District Judges and Judicial Commissioners for information and guidance, in cases where the plaintiff, though present when the case is called on, gives no evidence, though the burden of proof is on him.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Criminal Courts close only on Treasury Holidays.

CIRCULAR ORDER No. 1.

Dated Calcutta, the 28th February 1876.

HIGH COURT.

English Department.

(Criminal.)

THE Court having observed that certain Sessions Judges close their Courts on the Civil Court holidays to the great prejudice of public business, all Sessions Judges and Magistrates in the Lower and Extra Regulation Provinces are reminded* that the holidays published by the High Court are for observance in the Civil Courts only, and that the Criminal Courts, as a rule, should be closed on no days when the public Treasuries are open. In any case, a trial commenced ought to be finished, although a native holiday intervenes; and Sessions ought not to be interrupted, and the commencement of trials postponed, except on days when native usage absolutely requires the intermission of all business.

* *Vide* Circular Order No. 4, dated 2nd April 1868.

By order of the High Court,

(Sd.) W. M. SOUTTAR.

Registrar.

h

Change in Quarterly Statement D, Part II.

No. 184.

FROM

W. M. SOUTTAR, ESQ.,
Regr., High Court of Judicature at Fort William in Bengal,

TO

THE SUPERINTENDENT OF STATIONERY.
Dated Calcutta, the 9th March 1878.
(Original date, 18th February.)
HIGH COURT.
English Department.
(Criminal.)

SIR,

I AM directed to request that you will be so good as to have the accompanying tabular form added to your stock of criminal forms as a supplement to Quarterly Statement D, Part II. (High Court No. 117), with a view to its being *pasted exactly over the space now occupied by columns 2 to 7* and *under the numbers of the columns.*

2. The pattern now sent has been struck off under the Court's instructions in order to save time, and I am to desire that it may be printed at once in sufficient numbers to supply each Magistrate with 24 copies. These supplies should be sent, *as soon as possible,* without waiting for indents.

I have, &c.,
(Sd.) W. M. SOUTTAR,
Registrar.

GENERAL LETTER, No. 1.

Copy to Sessions Judges, Judicial Commissioners, and District Magistrates, for information and guidance.

(Sd.) W. M. SOUTTAR,
Registrar.

HIGH COURT.
The 9th March 1876.
(Original date 18th February.)

Note.—The forms previously received can be used for office copies.

Judges and Magistrates to submit Quarterly Statements D and E separately to High Court.

GENERAL LETTER No. 2.

Dated Calcutta, the 25th March 1876.

HIGH COURT,

English Department.

(Criminal.)

IN modification of para. 8 of Circular Order No. 11, dated 10th September 1873, the Court directs that Sessions Judges and District Magistrates shall, until further orders, submit the Quarterly Statements D and E separately and independently direct to the Court.

2. Each will fill up the portion concerning him in the present forms. In Part II. of Statement D, the Sessions Judge will continue to give the information hitherto given regarding Commitments. But this will now become for Magistrates a Statement of Miscellaneous Cases, and information regarding the following classes of cases will be given :—

Col. 2	. Possession.
„ 3	. Nuisance.
„ 4	. Maintenance.
„ 5	. Sureties of the peace.
„ 6	. Sureties for good behaviour.
„ 7	. Order with property.

3. The Superintendent of Stationery has already (See General Letter No. 1, dated the 9th March 1876) issued forms for this purpose.

(Sd.) W. M. SOUTTAR,
Registrar.

Specimens of all Registers kept in Subordinate Courts.

GENERAL LETTER.

No. 5.

FROM

W. M. SOUTTAR, ESQ.,

Regr., High Court of Judicature at Fort William in Bengal,

To

ALL DISTRICT JUDGES, JUDICIAL COMMISSIONERS, AND SMALL CAUSE COURT JUDGES.

Dated Calcutta, the 25th March 1876.

SIR,

I AM directed to request that you will be good enough to procure and transmit to the High Court an enumeration of all the Registers kept in your Court and in each of the Courts subordinate to you, as also a specimen form of each Register in Vernacular or English, as the case may be. Each Register should be on foolscap paper, with columns ruled in tabular form. It should show the title or name of the Register and the several headings under which entries are recorded. It should also have marked at foot the name and salary of the Clerk who actually keeps the Register.

2. Each set of Registers concerning any Court should be procured by you in duplicate: one of them should be filed in your office, and the other sent to this office in original. They should be despatched as soon as possible without waiting for the corresponding sets from other subordinate Courts.

3. All Office Registers and Diaries whatsoever, other than the Registers of money accounts, are to be thus submitted in complete specimen form.

4. You will regard this call as extremely urgent.

I have, &c.,

(Sd.) W. M. SOUTTAR,

Registrar.

Government Order, allowing Small Cause Court Clerks to draw Cheques on Local Treasury, cancelled.

No. $\frac{\text{T M}}{1230}$.

FROM

THE ACCOUNTANT-GENERAL, BENGAL,

To

THE REGISTRAR, HIGH COURT.

Dated the 21st March 1876.

SIR,

Letter to Government of Bengal No. $\frac{\text{T M}}{1128}$, dated 21st February 1876.
Reply No. 700, dated 25th February 1876.

WITH reference to my letter No. 554TM, dated 25th August 1875, I have the honour to forward a copy of the correspondence between this department and the Government of Bengal, from which you will see that the rule allowing clerks of Small Cause Courts, during the absence of the Judge, to draw cheques on the Local Treasury for payment of deposits, &c., has been cancelled.

I have, &c.,

(Sd.) H. A. MANGLES,

Accountant-General, Bengal.

b

No. $\frac{T\ M}{1128}$.

FROM

THE ACCOUNTANT-GENERAL, BENGAL,

TO

THE SECRETARY TO THE GOVT. OF BENGAL, JUDICIAL DEPARTMENT.

Dated the 21st February 1876.

SIR,

As the recommendation made in my predecessor's letter No. $\frac{T}{4748}$, dated 26th August 1874, that head clerks of Judges of Small Cause Courts be permitted to draw cheques on Local Treasuries or Sub-divisional Treasure Chests, during the absence of Judges on duty in other Courts, is found to be inconvenient in practice, and not imperatively required for the due performance of the public service, I have the honour to request your permission to consider Government Order No. 3645, dated 14th September 1874, as cancelled.

I have, &c.,

(Sd.) H. A. MANGLES,

Accountant-General, Bengal.

JUDICIAL.

No. 700.

Calcutta, the 25th February 1876.

FROM

J. CRAWFORD, ESQ.,

Offg. Under-Secretary to the Govt. of Bengal.

TO

THE ACCOUNTANT-GENERAL.

SIR,

IN compliance with the request contained in your letter No. 1128TM of the 21st instant, I am directed to inform you that the Lieutenant-Governor has been pleased to cancel the order No. 3645, dated the 14th September 1874, directing that a clerk in charge of a Small Cause Court, during the absence of the Judge on duty in another Court, may be allowed to draw cheques upon the Local Treasury in payments of deposit and other demands.

I have, &c.,

(Sd.) J. CRAWFORD,

Offg. Under-Secy. to the Govt. of Bengal.

GENERAL LETTER No. 6.

Dated the 29th March 1876.

Copy forwarded to all Small Cause Court Judges for information and guidance.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Registrar.

Applications for Repairs or Construction.

CIRCULAR ORDER

ISSUED BY THE AUTHORITY OF THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

(CIVIL.)

No. 6, dated the 24th April 1876.

DISTRICT JUDGES are directed to submit all applications for the construction of new

Court-houses, or for repair of the existing buildings, direct to the Government of Bengal, and not to or through the High Court.

Amendments allowed in Plaints to be made at once.

CIRCULAR ORDER

ISSUED BY AUTHORITY OF THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

(CIVIL.)

No. 7, dated the 1st May 1876.

THE Court adopts the following Circular Order, issued by the High Court, North-Western Provinces, and directs careful compliance with the practice enjoined :—

"It has been noticed by the High Court that, when a Civil Court allows a plaint to be amended, instead of the amendment being forthwith made in the plaint itself, the order to make the amendment is merely filed with the record.

2. "The Court points out that, when such permission or order is given, the amendment must be made in the plaint at once, and orders that it be attested by the signature of the presiding Judge."

Date of Execution of a Death Warrant to be not less than 14, nor more than 21, days from date of Issue.

CIRCULAR ORDER

ISSUED BY AUTHORITY OF THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

(CRIMINAL.)

No. 2, dated the 5th May 1876.

SECTION 301 of the Criminal Procedure Code directs the Court of Session, on receipt of the order of the High Court confirming a sentence of death, to issue a warrant to the officer in charge of the jail in which the prisoner is confined, to cause the sentence to be carried into execution. As it is expedient to provide that a sufficient but not excessive interval should elapse between the passing and the execution of such sentences, the High Court directs that the date named by the Sessions Court, in its warrant, for the execution of a sentence of death, shall not be less than fourteen, nor more than twenty-one, days from the date of the issue of such warrant.

Uses of Small New Seals.

CIRCULAR ORDER

ISSUED BY AUTHORITY OF THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

(CIVIL.)

No. 8, dated the 12th May 1876.

WITH a view to avoid wear and tear of the seals recently provided for the use of District Judges, Government has, on the recommendation of the Court, sanctioned the supply of seals of a smaller size and simpler make for use on minor occasions.

2. These seals, when ready, will be forwarded by the High Court.

3. It must, however, be understood that they are not to be used for sealing judgments, writs, processes, or other documents made or issued judicially; for such purpose the regular seal of the Court should alone be employed, under the superintendence of a responsible officer. But for all other purposes the smaller seals should be used.

Evasion of Stamp Law by Money-lenders—Promissory Notes.

CIRCULAR ORDER

ISSUED BY AUTHORITY OF THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

(CIVIL.)

No. 9, dated the 12th May 1876.

THE accompanying copy of a correspondence regarding evasions of the stamp law by native money-lenders in certain classes of loan-transactions, is circulated for the information and attention of all Civil Courts.

From H. LEE, ESQ., *Acting Assistant Secretary to the Government of Bengal, to the Registrar of the High Court of Judicature, Calcutta—(No. 1018, dated 13th April 1876).*

In continuation of this office letter No. 374, dated the 9th February 1876, I am directed to forward the accompanying copy of a letter* from the Board of Revenue, on the subject of evasions of the stamp law in certain classes of loan-transactions by native money-lenders, and to request that the Hon'ble Judges may be moved to direct the issue of the necessary instructions to the subordinate Civil Courts on the points indicated by the Board of Revenue for the prevention of the evasions in question.

*No. 222B, dated 23rd March 1876.

From W. H. GRIMLEY, ESQ., *Officiating Secretary to the Board of Revenue, to the Secretary to the Government of Bengal, Revenue Department—(No. 222B, dated Fort William, the 23rd March 1876).*

In paragraph 69 of the Board's Report on the Administration of the Stamp Department for 1874-75, an instance is related of the manner in which the stamp laws are evaded by native bankers in loan-transactions. In the case in question the money-lender was in the habit of advancing money without drawing up a formal bond, but a book was kept by him, made up of a number of loose pages, stitched together with a piece of string. On each page was a loan-transaction, thus: I, A. B., have this day borrowed of you, C. D., Rs. 100 with interest at 4 per cent. per mensem; signed A. B., witnesses E. F., &c.; loan to be repaid in such and such instalments; and so on. Each leaf of the book related to a separate loan-transaction, and could be removed at will. In case of default, the book, or leaf of the book, was produced in Court in support of a suit by C. D. against A. B. This is said to be a type of similar transactions of daily occurrence in many parts of Bengal, and it is asserted that Civil Courts frequently give decrees on such informal documents, sometimes without any enquiry as to the

absence of a stamp, and sometimes by admitting the document in evidence after payment of penalty-duty under the provisions of section 20 of the Stamp Act XVIII. of 1869. Either course is apparently illegal. The Member in charge is advised by the Advocate-General that each page of the loan book, as above described, constitutes a promissory note as defined in section 3, clause 25 of the Stamp Act, and is, therefore, liable to stamp-duty under article 2 of Schedule I. annexed to the Act; under section 18 they are not, therefore, admissible in evidence without being duly stamped. Nor is it possible to correct the omission of stamp-duty by payment to the Civil Court of penalty-duty under section 20, inasmuch as it is expressly declared in section 28 that the provisions of section 20 do not apply to promissory notes.

2. Mr. Money thinks that it would perhaps have some effect in checking evasions of stamp-duty on loan-transactions if the attention of the High Court were invited to the existence of the practice as above described, with the view of such instructions being issued to the subordinate Civil Courts as will prevent the acceptance in evidence of unstamped pages of an account-book in lieu of a sufficiently stamped promissory note, and also prevent their admission, on payment of penalty-duty, under section 20 of the Stamp Act.

3. I am further directed to suggest that the attention of Courts may be drawn to the fact that, in very many instances, promissory notes require to be engrossed on paper of a special kind, bearing stamps of a peculiar device. Under section 5 of the Act, all promissory notes, except those chargeable with the duty of one anna, must necessarily be written either on impressed paper, *i.e.*, paper impressed with a stamp, or upon paper upon which the stamp has been denoted in a peculiar manner by the Superintendent of Stamps or the Collector. Two samples A and B of impressed paper are enclosed. Specimen A, however, has ceased to be manufactured, and will only continue in use till present stocks are exhausted. A specimen (C) of denoted paper is also enclosed. This paper is denoted by the Superintendent of Stamps, Calcutta, and is sold to the public. The Collector of Calcutta also "denotes" by means of a circular steel die, but that process is effected after the body of the deed is written, and there is no mistaking it. Consequently, in certain cases, a promissory note inscribed on a leaf of an account-book, even though it were stamped with an adhesive stamp, is not admissible in evidence as being duly stamped in accordance with the law.

REVENUE CIRCULARS.

DECEMBER 1875.

HON'BLE V. H. SCHALCH, C.S.I.

ERRATUM.

In the Appendix B. to Board's Circular Order No. 5 of September 1875, for the words "(see section 6, clause 6)," substitute the words "(see section 5, clause 7)."

Requires an annual report in place of half-yearly reports, on the working of the rules, made under the Coinage Act of 1870.

No. 1.

IN accordance with instructions received from Government, District Officers are hereby requested to submit, in future, an annual report on the working of the rules for carrying out the provisions of the Indian Coinage Act (XXIII. of 1870) for the calendar year, in the form prescribed by Circular Order No. 2 of February 1874, in place of the half-yearly reports hitherto submitted.

No half-yearly return for the period ending 31st December 1875 will now be necessary; but the return for the year 1875 must, of course, include the figures already given for the half-year ending June 1875.

No. 8 of Augt. 1871.
" 2 of Sept. 1873.
" 2 of Nov. 1873.

The Board's Circular Orders noted in the margin are cancelled.

Draws attention to C. O. No. 7 of 1875 relative to claims made to deposits by holders of certificates of administration.

No. 2.

SEVERAL cases have recently occurred, in which deposits of old standing and of large amount have been fraudulently drawn from a Collectorate under certificates of administration to estates, procured from the Civil Court by means of forgery and false personation. In some of the cases in question, the Collector's proceedings were not sufficiently careful, too much reliance having been placed on the ministerial officers, who appear to have manipulated the cases as they pleased. The Member in charge, therefore, again desires to draw the attention of District Officers to the subject of Circular Order No. 7 of March 1875, and to enjoin the greatest caution in dealing with the claims put forward by applicants in such cases.

Copper coins to be received in Payment of Government dues only.

No. 3.

IT having been represented to the Board that inconvenience is caused by the payment into treasuries by Municipalities of an unlimited number of copper coins, attention is hereby drawn to the Notification of the Government of India, No. 959, dated 31st May 1869, published at page 1190 of the *Calcutta Gazette* of 16th June 1869, which lays down that copper coins are to be received without limit of amount *in payment of Government dues only*. District Officers need not, therefore, receive copper coin from Municipalities or from any other source (when not in payment of Government dues) for sums over fractions of a rupee.

Revised Questions for Treasury Inspections.

No. 4.

AT the instance of the Accountant-General, Bengal, the memorandum and

questions attached to Board's Circular Order No. 5 of November 1874, are cancelled, and the following revised questions are substituted in their place:—

Commissioners are, however, to understand that these questions are intended merely as a guide to them in cases where close and detailed enquiry seems to be *primâ facie* necessary. They are not bound to make such minute investigation in every instance, if they are satisfied that the treasury is well and carefully managed. At the same time they should remember that the more precise the information given, the more useful it is to the head office of the Account Department.

QUESTIONS FOR TREASURY INSPECTIONS.

Cash.

1. What is the amount in the treasurer's hands?
2. Are the different kinds of coin kept apart?
3. Is there any bag or store of coin in the treasury kept apart from the general balance?
4. Is there any money or valuables placed in the treasury for safe custody by private persons or other departments?
5. Does the amount of cash in the treasury, including currency notes, agree with the balance as shown in the daily balance-sheet?
6. Does the treasurer's daily balance-sheet show correctly its distribution between treasure under single and under joint locks?
7. Has each chest a memorandum of its contents altered and initialled by the treasury officer when money is put in or taken out?
8. Is small silver readily obtainable on application?
9. Do officers in charge of sub-divisional treasuries send a monthly certificate of personal verification of their balances?
10. Are the balances at such sub-treasuries verified during the tours of District and inspecting officers?
11. Are requisitions for copper coin ever received from sub-divisions; and, if so, are they promptly answered?
12. Is the supply of copper at each sub-division ample to meet all demands?
13. Is Government copper coin freely taken without limit of amount?
14. Is it freely issued to all applicants seeking it in exchange for silver or in payment of claims against Government?

Currency.

15. Are notes of foreign circles freely taken when tendered in payment of Government demands?
16. Is the placard in English and the vernacular (touching encashment of notes) exhibited in a conspicuous place, when the balances allow such encashment?
17. Are currency notes of the home circle arranged in bundles according to their denominations?
18. Are they placed in order of receipt?
19. Are they regularly re-issued in the order of their receipt?
20. Is the prohibition to demand the name of the payer or receiver of notes, obeyed?
21. Is the note register punctually kept up?
22. Is it in English or the vernacular?
23. Does it separate the different denominations of notes?
24. Does it separate notes of the home circle from those of foreign circles?
25. Are the notes of foreign circles kept apart, but in bundles and with care in arrangement similar to that observed for home notes?
26. Are they ever re-issued without special application from the person receiving them?

Stamps.

27. Is the key of the store of stamps kept in the actual custody of treasury officers?
28. Is the store account of stamps kept regularly up to date?
29. What stock is left with the treasurer or official stamp vendor?
30. When was stock last actually taken?
31. By whom?
32. Was it found to agree with the balances in the register?

Excise Opium.

33. Is the key of the store of opium kept in the actual custody of treasury officers?
34. Is the store account of opium kept regularly up to date?
35. What stock is left with the treasurer or opium vendor?
36. When was stock last actually taken?
37. By whom?
38. Was it found to agree with the balances in the register?

Bill Forms.

39. Where are spare stores of bill forms kept ?

40. Under whose key ?

41. Are the books of forms required for he day's use, issued in the morning ?

42. And are they checked by the treasury officer on return in the evening ?

43. Are issue-registers ruled, paged, and initialled by the treasuryo fficer before the year begins ?

44. Are the counterfoils of bills issued initialled by the treasury officer ?

45. Do they agree with entries in the issue-register on the experience of a few taken at random ?

46. Are the issues of duplicates noted in the issue-register ?

Note—That the counterfoils of duplicate of bills will mkae it easy to test the observance of rule in this matter.

47. Where are files of original advices of bills drawn on the treasury kept ?

48. Are those from each treasury laid together in order of dates ?

49. Is the check-register of bills payable written up daily from the advices received ?

50. Does the treasury officer ever check the entries by the original advices ?

51. When bills are presented for payment, are they checked with the check-register of bills payable ?

52. Are the date and amount of payment entered in the check-register ?

53. Is it also marked off in the original advice ?

Money Order Forms.

54. Where are the spare forms of money orders kept ?

55. In whose charge ?

56. Where are advices of money orders payable kept ?

57. How arranged ?

58. Who can get access to them ?

59. Where is the dating stamp ? Are all its moveable letters and figures forthcoming ?

60. Are funds for money-order use kept in a separate bag still, or are the gross receipts and the gross payments carried to the cash book daily ?

Deposits.

61. Are new receipt-registers opened every year ?

62. Does the treasury officer initial each deposit in the receipt-register ?

63. Does he ever question the admissibility of a deposit ?

64. Is the order for repayment passed without previous reference to the receipt-register ?

65. Is each repayment entered in the receipt-register at the time of payment, and initialled by the treasury officer ?

66. Is there a periodical agreement of the balance on Government books at credit of a Municipality, and that claimed by the Municipality ?

67. Is a formal acknowledgment of the correctness of the Government balance periodically passed by the Municipal Committee, and recorded in the treasury ?

Pensions.

68. Is there a register kept of the permanent orders payable at the treasury ?

69. Is the file of permanent orders complete according to that register ?

70. Is it accessible to strangers ? To any one but the treasury officer ?

71. Are the orders in good condition ?

72. Are all payments noted on them ?

73. Are any improperly detained, new payment of pension having been more than six months due ?

74. Does the treasury officer regularly check the pensioner's mark with the original order before paying him ?

75. In case of pensioners permanently exempted from personal attendance, is proof every year obtained of their continued existence (Pension Code, p. 826), and recorded ?

Public Works Department.

76. Is every credit-order charged off on due date, and credited in the Executive Engineer's pass book.

77. Is anything credited in the Public Works pass book but the amounts of credit-orders issued by the Accountant-General ?

78. Is the original pass-book with the Executive Engineer ?

79. How often does he send it to be written up ?

80. Is the treasury duplicate kept up to date ?

81. Is it laid before the treasury officer before any new cheque is passed for payment ?—

Treasury Furniture.

82. Are the following kept in the actual personal custody of treasury officer ?

One key of treasure room or vault, and one key of each treasure chest.

83. Are the other keys in the custody of the treasurer ?

84. What is the state of the treasure boxes?

85. Have those in use Chubbs' or other reliable locks?

86. In what condition are the set of minimum weights and test scales?

87. Are rupees supposed to be light tested by those scales before being cut?

Establishment.

88. Are receipts taken in a register for all pay and allowances issued?

89. Is a stamped receipt required wherever the amount exceeds Rs. 20?

90. Have service-books been prepared for the whole establishment?

91. Are they kept up to date?

92. What security does the treasurer give?

93. Where is the bond kept?

94. When was it last tested?

95. Who appoints cash-keepers at sub-treasuries?

96. And on what security?

Miscellaneous.

97. Is a register kept of Government paper on which interest has been made payable at the treasury?

98. Is every payment made on the authority of a letter of credit noted thereon at the time of payment?

99. Are printed forms (chalans) available readily to persons having to pay money into the treasury?

100. Is money ever received without one?

101. Are payments made before a formal order is obtained from the treasury officer?

102. Are they at once noted in the cash-book?

103. Are standing orders transgressed by the maintenance of a second set of accounts in the vernacular?

104. Is the Circular File of the account-office complete?

105. Is it accessible?

106. Does the treasury officer take pains to see that important new Circulars are understood?

107. Are returns for the account-office written up day by day?

108. What record is kept of the Accountant-General's orders of retrenchment?

109. In whose custody is it?

110. Is reference made to it before new pay is issued?

111. Is the statement of daily cash-transactions *fully* agreed with the cash-book and the accountant's daily balance-sheet before the establishment leaves office each evening?

112. Does the treasury officer see that the cash balance shown against each sub-divisional treasure-chest agrees with that admitted by the sub-divisional officer on the last returns embodied?

113. Are the office registers and records in good order?

114. Are remittances acknowledged promptly, that is, on the day of arrival as well as afterwards, when the outturn is reported?

115. Does the Collector personally consider the three months' estimate sent to the Accountant-General?

116. Are all references from the Accountant-General answered; if not, how many are in balance?

117. Are proper precautions taken that every letter received is brought under the personal notice of the treasury officer?

Adds a condition to the prescribed form of putwaree's contract.

No. 5.

THE following should be added as condition 6 to Form A annexed to Circular Order No. 3 of December 1874, and the present conditions "6 to 11" should be numbered "7 to 12":—

"6. I bind myself to perform the duties of putwaree as required by law. (*Note.*—This will be added only where such an arrangement is made, otherwise it will be omitted.)"

A. MONEY, ESQ., C.B.

Duties of Collectors where unstamped or insufficiently stamped documents are produced before them.

No. 6.

THE following extracts from Government Order No. 2857, dated 4th December 1875,

b

ontaining the views of the Lieutenant-overnor with regard to the duties f District Collectors in cases in which nstamped or insufficiently stamped documents are produced before them, under ircumstances sufficient to satisfy them that here was an intention of evading the law, re circulated for the information and uidance of the officers concerned; and the Member-in-charge directs that, until further rder, reports be submitted to the Board of ach case of prosecution for evasion of the tamp laws:—

"2. Under section 43 of Act XVIII, 'of 1869, it is necessary that all prosecutions 'under the Act should be instituted and 'conducted by the Collector or other authorized officer, and it is essential to a prosecution 'under section 29 that the Collector 'should be satisfied that the particular 'instrument, in respect of which a prosecution is to take place, was executed on 'unstamped or insufficiently stamped paper 'with the intention of evading payment of 'the proper stamp-duty."

"3. But, when the Collector has satisfied himself upon this point, the Lieutenant-Governor is advised that it is not necessary "that any fraudulent intention should be "proved before the Court in which the "offender is prosecuted. The offence is "complete when the particular terms of "section 29, creating such offence, have "been contravened, and it is no defence "to the prosecution to plead that the person "charged had no intention of evading the "law. It appears to have been the intention "of the Legislature to make the question "of intention one exclusively for the determination of the Collector, and the Criminal "Court is bound to convict upon the mere "proof of the facts, *i. e.*, on the production "of the unstamped or under-stamped document and evidence that it was executed, "&c., by the accused person."

* * * * *

"5. The Lieutenant-Governor believes "that Collectors have been deterred from putting the law into active operation by the "supposed difficulty of adducing such evidence of fraudulent intention as would "satisfy the Criminal Court. It is clear "that cases will frequently occur in which "a Collector may feel no moral doubt that "an evasion of the law was intended, but "in which direct evidence upon the question "of intention might not be forthcoming. In "such cases, I am to say, the Collector, "if satisfied upon reasonable grounds of "belief and probability that there was an "intention of evading the law, should prosecute the offender in the Criminal Court."

"6. The almost stationary state of the "General Stamp Revenue, contrasting as it "does so remarkably with the rapid increase "of receipts from Court Fees Stamps, shows "the necessity of measures being taken to "enforce the more general observance of "the law. I am, therefore, directed to request "that the Member-in-charge will issue a "Circular to District Collectors, pointing out "to them that, in cases in which unstamped "or under-stamped documents come under "their notice, under circumstances which "are sufficient to satisfy them that there "was an intention of evading the law, it "is their duty to prosecute the offenders "in a Criminal Court, and that the Government is advised that, in such cases, it is not "necessary that any evidence to prove the "fraudulent intention should be offered by "the prosecution. As it is believed that "the law has not hitherto been strictly enforced, it is the wish of the Government "that care and circumspection should be "used in instituting these prosecutions; but "the Lieutenant-Governor believes that, if "a few cases were prosecuted in every district, and convictions were obtained, the "obligations imposed by the law would be "brought forcibly to the notice of all classes "of the community, and a considerable increase of the stamp revenue would be the "result. In these prosecutions, which "would be instituted by way rather of warning than of punishment, it would not be "necessary for the Collector to press for the "infliction of severe penalties. The result "of the prosecutions which may be instituted under these orders should be reported "to Government in order that it may be "ascertained whether any modification of "the existing law is necessary or desirable."

JANUARY, 1876.

HON'BLE V. H. SCHALCH, C.S.I.

Annual Bills of Record-room Contingencies superseded by detailed monthly bills.

No. 1.

DISTRICT OFFICERS are informed that annual bills of record-room contingencies, wherever such bills have hitherto been submitted to Commissioners, will be discontinued, their place being supplied by the detailed monthly bills prescribed by the Accountant-General's Circular No. 337, dated 2nd August 1875. This does not, however, in any way affect the submission by local officers of annual estimates of requirements from the record grant, and statements of expenditure therefrom required by clauses 1A and 1D, section 7, p. 211 of the Board's Rules. These will continue to be submitted as heretofore.

Sureties of Farmers—Property in Bengal.

No. 2.

A CASE has been brought to the notice of the Board in which the property of the surety of a farmer, who had defaulted in the payment of revenue, was found to be situated in the North-Western Provinces, and, therefore, beyond the power of the Revenue Authorities to attach under Act VII. (B.C.) of 1868. The Member-in-charge desires to warn Collectors to make certain that the sureties of farmers possess sufficient property *within the jurisdiction of the Lieutenant-Governor of Bengal* to make good the amount for which they undertake to become responsible.

A. MONEY, ESQ., C.B.

Board's Rule 8, section 1, as to issue of stamps after the 27th of the month.

No. 3.

As the working of rule 8, section 1, page 304 of the Board's Rules, is attended with some inconvenience to the public, the following rule is to be substituted for it :—

8. The issue of stamps from sub-divisional treasuries after the 27th of a month is not now prohibited, but all transactions as to stamps from the 28th to the 31st should be credited in the District Treasury Accounts as transactions of the ensuing month, except in March, when the same procedure is to be adopted in regard to stamps after the 27th as is followed in regard to other transactions.

A certificate of payment of the purchase-money of a tenure sold under Regulation VIII. of 1819 not liable to be stamped as a conveyance.

No. 4.

IT has been the practice in some districts to treat certificates, which are issued under the provision of section 15, Regulation VIII. of 1819, of the payment of the purchase-money of tenure sold under that Regulation, as deeds of conveyance, and to require them to be stamped accordingly, but the legality of this practice having been called in question, the Advocate-General was consulted on the subject, and has expressed an opinion that the practice is irregular. In accordance with the order of the Member-in-charge that opinion is now circulated for the information and guidance of District Officers in respect to the mode of treatment of such certificates in future.

"A Putni is a lease within the meaning of the General Stamp Act, 1869 [see Schedule I., art. 19, clause (*e*)], and a lease is not a conveyance within the meaning of the same Act (see definition of conveyance, section 3, clause 11)."

"With reference to the stamp which is to be affixed on a Putni, provision is made in Schedule I., art. 19, clause (*e*), but no specific provision appears to be made in the General Stamp Act, 1869, for the transfer or assignment of a lease. The definition of a lease, as given by the General Stamp Act, 1869, does not, in my opinion, cover the transfer or assignment of a lease, *but*, even if it be supposed to extend to a transfer or assignment of a lease, it is obvious that the operation of that section cannot be made to include a mere certificate of payment. It is to be noted that, although provision is made in the General Stamp Act for an assignment of an interest secured by a bond or mortgage-deed (see Schedule I., art. 13), and also for a surrender of a lease (see Schedule I., art. 20) none has been made for a transfer or assignment of a lease."

"Under the above circumstances, I am of opinion that a certificate of payment of the purchase-money, which is evidence of the transfer of the Putnidar's interest to the purchaser, is not liable to be stamped as a conveyance."

Non-judicial Stamps.

No. 5.

WITH reference to the instructions contained in the Board's Circular Order No. 5. of September 1872, it should be noted that the following descriptions of stamps are to be included under the head, "Non-judicial," in the periodical stamp returns :—

Stamped tender-forms of the Public Works Department.

Special adhesive stamps.

District Superintendents of Police—Excise Duties.

No. 6.

WITH reference to para. 14 of the Government Resolution, dated 9th November 1875, on the Board's Excise Administration Report for 1874-75, the District and Divisional Officers are requested to notice in their respective Annual Excise Reports the names of the District Superintendents of Police who may distinguish themselves by taking special interest or the contrary in the excise branch of their duties.

FEBRUARY, 1876.

HON'BLE V. H. SCHALCH, C.S.I.

Adds a clause (4) to Board's Rules, Ch. VIII., s. 9.

No. 1.

THE following is added as clause 4, section 9, Chapter VIII. (page 154) of the Board's Rules :—

4. The foregoing rules, 1 to 3, relate to the settlement or re-settlement of individual estates or parts of estates. But settlements of whole districts or pergunnahs, or other subdivisions of districts, should be made, and engagements taken, subject to the confirmation of the Government of India, to which, through the Government of Bengal, the proceedings will be reported in due course for such confirmation.

Substitutes Rules 3 to 10 for clauses 3 to 5, section 6, Chapter III. of the Board's Rules.

No. 2.

THE following rules, 3 to 10, are substituted for clauses 3 to 5, section 6, Chapter III. of the Board's Rules, the present clauses 6 to 10 being numbered 11 to 15 :—

3. These rules shall also be applicable to all suits connected with the estates of wards of Court, or with other estates, the property of individuals, in charge of the Revenue Authorities, subject to the reservations and explanations contained in paragraphs 4 to 10 following :—

4. Under section 72, Act IV. (B. C.) of 1870, every suit (except suits in the High Court) brought on behalf of a ward must be authorized by some order of the Court in charge of such ward, and the fact of this authorization must be cited in the plaint. Care must be taken that this sanction is applied for in good time, that no cases may be unnecessarily barred by limitation.

5. In the case of ordinary suits under the Rent Law, not involving any points of intricacy or legal difficulty, it will be enough for the manager to submit through the Collector for the formal sanction of the Court of Wards, a monthly statement of suits which it is proposed to institute. This statement will set forth :—

(1)—The defendant's name and status (whether tenure-holder or ryot, &c.).

(2)—The nature of the claim.

(3)—The period embraced in the claim.

(4)—The amount of the claim.

(5)—Any general or special remarks as to the nature and ground of the suits necessary to enable the Collector and the Court of Wards to judge of their propriety.

6. It will not be necessary for the Collector or Court of Wards to refer cases of the kind described in the last preceding rule to the Legal Remembrancer. But all other cases involving important principles or points of difficulty, and all suits for enhancement of rent, must be treated under the ordinary rules for the conduct of Government suits, and the pleadings will invariably be referred through the Court of Wards for the opinion of the Legal Remembrancer.

7. In the appointment of an associate pleader for ward's cases, the Collector need not obtain the sanction of the Commissioner, but shall consult the manager. Instead of the mere authority to appear, given to the Government Pleader under section 15, the Collector, or, where there is a manager, the manager, shall, in cases connected with a ward's estate, execute a power-of-attorney on a stamp-paper of the proper value. Clause 9, section 4 of the present chapter, shall not be held applicable to the case of disbursements on account of claims against ward's

estates, which may be compromised, the Commissioner being competent to sanction such disbursements on his own authority, under provisions of section 49, Act IV. (B. C.) of 1870.

8. Under section 69 of the Act, the ward must (except in suits before the High Court) sue or be sued in his own name, describing himself, or being described, as a ward of Court; and, as a rule, the manager must be named as next friend. Accordingly, the following form should be adopted in plaints on behalf of a ward of Court:—

"*A B*, ward of the Court of Wards, inhabitant of , by *C D*, inhabitant of , manager of the estate of the said ward of Court, sues *E F*," &c.

9. Similarly, in cases where the ward is defendant, the answer should be in the following form:—

"*A B*, inhabitant of , sues *C D*, inhabitant of , ward of the Court of Wards, of whom *E F*, inhabitant of , the manager of the estate of the said ward, is next friend or guardian."

10. In regard to any suit which may have been instituted against, or on the part of, any ward of the Court, before the estate of the ward whom it concerns was brought under the Court's control, and which has consequently been instituted against, or in the name of, some manager, naib, or gomashta, other than the manager appointed by the Court, the Collector shall cause an application to be made to the Court in which the suit is pending to cause the name of the manager appointed by the Court of Wards, or that of some other person, as provided in section 69 of Act IV. (B.C.) of 1870, to be substituted for that of such manager, naib, or gomashta as next friend or guardian of the ward in suit.

A. MONAY, ESQ., C.B.

Return of surrendered Rowannahs.

No. 3.

THE officers in charge of the districts mentioned in the margin are requested to take particular care that rowannahs surrendered from the commencement of this year, under section 22 of the Salt Act (Act VII. of 1864)

Chittagong.
Noakhally.
Backergunge.
Howrah.
24-Pergunnahs.
Jessore.
Midnapore.
Cuttack.
Pooree.
Balasore.

and Salt Rule 35, are not allowed to acc
late in their offices or at the police-sta
All such rowannahs should, in futur
returned to this office precisely on the
open day of each week, arranged i
order of their numbers, and entered
list. Should there be no rowannahs to
at the beginning of any week, intimati
that effect must be given to this office i
course of the week.

It is further requested that all surren
rowannahs of the previous year may be
at once to this office.

These instructions, of course, do not
to rowannahs issued by the Collecto
Cuttack, Pooree, Balasore, and Chitta
Of these, an account is kept in the di
offices.

The Responsibility of Sheristadars as reg
Stamp Frauds.

No. 4.

THE attention of Divisional and Di
Officers is drawn to the following insta
of stamp frauds which recently came b
the Member-in-charge's notice.

2. It was the practice in the Di
Office in which the frauds were comm
for the parties requiring copies of docum
to affix the requisite adhesive stamp to
blank sheets of paper, which, under the
in force, all applicants for copies are requ
to provide at their own cost for the pur
of the copy being written thereon. On
of the frauds to which attention is d
was committed in respect of the stamp
affixed by removing them from the
paper, and by filling up the hole which
punch had made by a circular piece punc
out of another stamp, and picked up so
where about the Collector's Office.

3. Again, in the same office, there
Court processes found among the record
which no Court-fee Stamps or stamp
too low value had been affixed, although
processes had actually issued, and the re
site stamps had been supplied to the Nazir'
Department, or the full money-value paid in
on the understanding that the Nazir woul
affix the proper stamp.

4. The Member-in-charge observes tha
the first kind of fraud would have bee
effectually prevented had the punched piec
been destroyed, as laid down in section 30 o
Act VII. of 1870, and in Board's Circula
Order No. 4 of February 1874, while the
second kind of fraud would not have at all

urred if the provisions of section 25 of Act had been followed. The sheristadar he Collectorate where the fraud was com-ted was much to blame for neglecting to form carefully and intelligently the duty rusted to him of inspecting documents as scribed by Board's Circular Order No. 3 October 1873; and the Member-in-charge, sidering this as one of the cases in which public interests require that laxity of trol on the part of an official in the posi-n of a sheristadar should not pass without h punishment as may serve as a warning others, has made the following recom-ndation to Government:—

"The Member-in-charge has attentively onsidered all that the Collector urges in e Sheristadar's favour. The character iven is a very high one, and, coming from n officer of experience and ability, carries reat weight. A long course of excellent ervice like the Sheristadar's entitles him n the present occasion to indulgent con-deration. While entirely recognizing this ct, Mr. Money feels himself called upon the same time to uphold the principle at the native head of the office is responsi-e for the general working of every depart-ent on the vernacular side of the office. ut for his antecedents, which plead strong-in his favour, and but for the fact that timately the discovery of the frauds was e to the Sheristadar, the Member-in-harge would have recommended the pass-g of a severe order on him in the present ase. As it is, Mr. Money recommends at his pay be reduced by one-fourth for e next two months."

. The officers implicated in the fraud e the Nazir and the Naib Nazir, and they e each been sentenced to six years' im-onment, the latter with hard labour.

6. In communicating the above facts, the Member-in-charge takes this opportunity of equesting District Officers to impress on heir sheristadars their responsibility as ointed out in this case.

HON'BLE V. H. SCHALCH, C.S.I.

Erratum.

For "February 1867" read "February 1876" in the last issue of Circulars.

Chapter XII. Addendum—"Revenue Agents."

No. 5.

THE following should be added to clause 7, section 4, Chapter XII. of the Board's Rules: Against heading D, "Acts VIII. (B.C.) of 1869, VIII. of 1859, and XXIII. of 1861;" and after heading F, "G.-General, Acts XX. of 1865 and IV. of 1876."

2. After the words "Revenue Agents," in the heading of section 5 of the same chapter, add the words "practising in Revenue Courts and Offices."

Copying and Searching Fees do not interfere with Court Fees.

No. 6.

DISTRICT OFFICERS are informed that Board's Circular No. 1 of September 1875, regulating fees for copying and search, does not in any way interfere with the realisation of Court fees, where these are also required by law, *vide* paragraphs 15 and 16 of that Circular. Court fees are, under Schedule I, clause 9 of the Court Fees Act (VII. of 1870), required upon copies of maps taken out of any revenue court or office. In calculating the Court fees on copies of Thakbust and Khusrah maps, the same mode of calculation may be adopted as is prescribed in paragraph 21 of the Circular for ascertaining the copying fees.

A. MONEY, ESQ., C.B.

General power-of-attorney to be produced on every occasion on which any of several persons acts under it.

No. 7.

IT has been brought to the notice of the Board that a practice prevails in parts of Bengal under which a single general power-of-attorney is used to authorize several persons living in different zillahs, and having distinct occupations, to act for the person who executes the power. In order to discourage this practice as much as possible, the Board think it right to remind District Officers that it is their duty to require, on each occasion, the production of the general power by virtue of which any act is to be performed before them.

MARCH, 1876.

A. MONEY, Esq., C.B.

New Table of Rates of Discount on Sales of Stamps.

No. 1.

IN continuation of the Board's Circular Order No. 2 of August 1874, the following *Table*, showing the rates of discount to be allowed in future on sale of general and Court Fees stamps respectively, is published for the information and guidance of all Revenue Officers.

Rates of Discount.

General or Non-judicial Stamps.						Judicial or Court Fees Stamps.*	
Class I. (Adhesive Stamps coming under Schedule I., articles 1 and 2, and Schedule II., articles 1 to 9.)				Class II.* (All other stamps prescribed by the General Stamp Act of 1869.)			
1	2	3	4	5	6	7	8
	Stamps not exceeding in value 8 annas each.	Stamps exceeding in value 8 annas each, but not exceeding in value Rs. 5 each.	Stamps exceeding in value Rs. 5 each, but not exceeding in value Rs. 50 each.		Per cent.		Per cent.
	Per cent.	Per cent.	Per cent.				
Calcutta ... Howrah (Sudder Station) ... 24-Pergha. (Sudder Station) ...	3½	2	1	Vendors licensed at places where stamps are sold by Government, except in Calcutta where salaried vendors are employed.	3	Moorshedabad ... Dinagepore ... Maldah ... Rungpore ... Mymensingh ... (Licensed vendors at places more than five miles distant from either a Sudder or Sub-divisional treasury.)	2
Hooghly (Sudder Station) ...	5	3	1½	Vendors licensed at other places	4	Sundeep Island	3½
All other places ...	6¼	4	2			All other places, except Calcutta where salaried vendors are employed	1½

N.B.—Stamps coming under this class (I) may be sold by any person, and discount at the above rates is allowed on purchases of the total value of Rs. 5 and upwards at one time.

* Only the *licensed* vendors purchasing stamps of the total value of Rs. 25 or upwards at one time are allowed discount on these kinds of stamps.

Note (1).—No discount is allowed on the purchase of any general or Court Fees Stamps of which the value is more than Rs 50 and Rs. 75 respectively; nor on any stamp applied on material furnished by the purchaser himself.

Note (2).—Discount is allowed at 6¼ per cent. on sale of the special description of paper to be used for documents under the Court Fees Act, VII. of 1870.

Interportal Steamers exempted from Rule 6, Sec. 5, Chapter V.

No. 2.

INTERPORTAL sea-going steamers having been exempted by Government from the operation of Rule 6, section 5, Chapter V., page 58 of the Board's Rules, the words "or interport" should be omitted from line 2 of that rule and also from the heading and para. 1 of Form 4 at page 84 of the same rules.

Additional Rules for Sale and Use of Court-Fee Stamps.

No. 3.

IN connection with the measures which are necessary for the prevention of the fraudulent use or abstraction of Adhesive Court Fees Stamps, the Member in charge has thought fit to prescribe the following instructions for the guidance of all Divisional and District Officers:—

(*a*.) No ministerial officer, who is not specially authorized to do so, shall sell stamps to, or buy stamps for, or receive money on account of the purchase of stamps from, any person whatever. Any one infringing this rule will be liable to dismissal.

(*b*.) It will be the duty of the record-keeper, on receiving records from a mohurir, to ascertain whether all the papers in the records which require stamps are properly stamped, and whether any of the stamps show signs of having been tampered with, and immediately to report any deficiency to his superior officer.

(*c*.) The mohurir in charge will be responsible for the value of all stamps taken from any record in his charge, and no excuse as to absence of knowledge should be listened to.

2. It is suggested that District Officers, in their magisterial capacity, should apply similar rules to the above to those of their subordinates, police officers and the like, who may not be subject to the Board's control.

HON'BLE V. H. SCHALCH, C.S.I.

Return No. VI.-B to be submitted in future to Legal Remembrancer.

No. 4.

IT is hereby notified for general information that, from the 1st April 1876 (the commencement of the next financial year), the Board of Revenue will cease to have the control of the business connected with civil suits. The Legal Remembrancer will, from that date, act directly under the orders of the Government of Bengal. Board's Return No. VI.-B will, in future, be submitted to the Legal Remembrancer and not to the Board.

A. MONEY, ESQ., C.B.

Corrections in form of License for Vend of Stamps.

No. 5.

DISTRICT OFFICERS are requested to make the following corrections in the form of license (Board's Miscellaneous Form No. 164) for the vend of stamps under Act XVIII. of 1869.

Condition 2, line 2.—Insert the words "in the language of the district" between the words "and" and "the." In line 1 omit the word "bi-colour."

APRIL 1876.

A. MONAY, ESQ., C.B.

Atraffee Rowannahs, Challans, and Boat-notes not to be sent to Board's Office.

No. 1.

IN connection with Circular No. 3 of February last, some Collectors have sent to this office a large number of atraffee rowannahs and challans. As atraffee rowannahs are not granted by the Board, and as they are required to be examined and registered in the Collector's office under Rules 9 to 17 at pages 13 and 14 of the *Salt Manual*, they should be retained by the Collector. The return of challans and boat-notes is also unnecessary.

Certificates of Purchase-money of a Tenure are not Conveyances and should not be Stamped—C. O. No. 4, of January 1876, cancelled.

No. 2.

IT has been the practice in some districts to treat certificates, which are issued under the provisions of section 15, Regulation VIII. of 1819, of the payment of the purchase-money of a tenure sold under that Regulation, as deeds of conveyance, and to require them to be stamped accordingly. The Advocate-General and the Legal Remembrancer are both of opinion that these certificates of payment are not conveyances, and the Member in charge agrees with them. Such certificates should not, therefore, be stamped in future.

2. The Board's Circular Order No. 4 of January 1876 is hereby cancelled.

A Mukhtarnama filed by Revenue Agent only entitles him to plead, and not to take away Valuable Documents, &c., Special Powers being needed for these Functions.

No. 3.

THE question has recently been considered whether a mukhtarnama stamped under heading 10, Schedule II. of the Court Fees Act, VII. of 1870, and filed by a Revenue Agent under Act XX. of 1865, in any one case before a Revenue Court, can be made to cover such acts as taking away valuable documents from an office, or drawing money from the treasury, or executing agreements with Government, or whether it is necessary

that for such purposes a special power-of-attorney under heading 18 of Schedule II. of Act XVIII. of 1869 should be produced; and with reference thereto, the Member in charge is advised that a revenue agent cannot, under a mukhtarnama stamped as aforesaid, be considered empowered to perform any of the abovementioned acts, none of them being contemplated in a mukhtarnama mentioned in Schedule II. of the Court Fees Act. A pleader can only appear, plead, and act, and a revenue agent can only practise as a revenue agent before the Board of Revenue, and in any office subordinate thereto. Unless, therefore, the mukhtarnama is stamped with the sum specified in Schedule II. of Act XVIII. of 1869, either as a special or general power, and such power expressly authorizes the taking away of valuable documents from an office, or the drawing of money from a treasury, or the executing of agreements, the revenue agent can do no more than conduct the case.

2. It is requested that Divisional and District Officers will note the foregoing ruling for their information and guidance.

Securities taken from Officers entrusted with Public Money.

No. 4.

THE following Resolution of the Government of Bengal, on the subject of the securities to be taken from officers entrusted with Government money, is published for the information and guidance of all Divisional and District Officers:—

Calcutta, the 15th March 1876.

Resolution by the Government of Bengal, Financial Department.

READ—

The Resolution of this Government in the General Department, dated the 22nd April 1869, directing the periodical scrutiny of the securities taken from officers of Government in positions of trust.

A letter from the Commissioner of Orissa, No. 34, dated the 21st April 1875, recommending that security should be taken from all subordinates who are in any way entrusted with the disbursement of public money.

Circular No. 15, dated the 1st June 1875, calling for the opinions of Commissioners of Divisions upon the above proposal.

The replies of the several Commissioners, and a letter on the same subject, No. 78A, dated the 11th February 1876, from the Secretary to the Board of Revenue in the Land Revenue Department.

The attention of the Lieutenant-Governor was drawn to this question by the discovery, in March 1875, of a series of embezzlements committed in the office of the Magistrate and Collector of Balasore. The ministerial officers implicated in these embezzlements were the head clerk of the Road Cess

Department and the local fund clerk. Neither of these officers had given any security.

2. The Commissioner of Orissa, in submitting his report on the case, urged that experience had shown the necessity of demanding substantial security from all officers entrusted with the expenditure of Government or local funds. The great majority of the Divisional Commissioners, who were consulted, have concurred in this opinion, and it is also supported by the Member in charge of the Land Revenue Department of the Board.

3. It appears on inquiry that, by the existing practice, security is taken from some officers on both the Revenue and the Judicial sides; but duties involving the custody and payment of money have much increased during the last few years, and it does not seem ever to have been laid down as a general principle that all ministerial officers to whom Government money is entrusted, shall be required to give security for the due fulfilment of the trust. The consequence has been, as represented by the Magistrate of Balasore, that the expenditure of public money is sometimes left in the hands of ministerial officials who have neither given security nor have sufficient appliances for the custody of cash.

4. The Lieutenant-Governor, having regard to these circumstances and other cognate circumstances which have come to his notice at different times, is of opinion that the time has come for a revision of the orders upon this subject, and he is prepared to accept the general principle that ministerial officers whose duties require that public money (whether strictly Government money or local or municipal funds) should pass through their hands, should be required to furnish security to the amount of 10 per cent. in excess of the highest sum which is likely to be in their custody at one time. It is observed, however, that some of the Commissioners have proposed to extend the rule to officers of the department of account, and the Lieutenant-Governor does not see that there is any necessity for this. Nor does it appear necessary to apply the principle to those officers who are merely entrusted with the expenditure of a fixed permanent advance, as the situation of such officers may be considered to be a sufficient security for such small disbursements.

5. All heads of departments are accordingly directed to draw up lists of their subordinates who should be required to give security under this rule, with the amount of security to be given in each case, and to submit the lists for the approval of the Government. Revenue officers should submit the lists through the Commissioner and the Board of Revenue, and Magistrates through the Commissioner of the Division. In drawing up the lists, it should carefully be considered whether it may not be possible to concentrate, in the hands of a smaller number of officers than at present, the duties which involve actual dealings with public money so as to limit, as far as possible, the necessity for giving security.

6. It is to be understood that these orders are not intended to apply to any officers who give security under the present rules. Such security will be given in the same manner and to the same extent as before; but it will be open to any District Officer who may be of opinion that the security given by any of his subordinates is manifestly insufficient to recommend that the amount of such security should be raised. In the case of such poddars as are appointed on the responsibility of district or sub-divisional treasurers, no separate security need be taken, but the security bond of the treasurer should be worded so as to cover any possible defalcation by his subordinates.

7. In determining the nature of the security to be given, the Lieutenant-Governor desires to maintain the principle accepted by Government in this office letter No. 2691, dated the 1st August 1872, to the address of the Secretary to the Board of Revenue in the Land Revenue Department. Security in the form of a deposit of cash or promissory notes in preference to the pledge of landed property should, therefore, not be insisted on in cases in which the adoption of such a rule would operate hardly upon ministerial officers drawing small salaries.

MAY 1876.

HON'BLE V. H. SCHALCH, C.S.I.

Revised Rules relating to the "Fund for the Improvement of Government and certain temporarily-settled Estates."

No. 1.

IT has become necessary, for several reasons, to revise the Circular Order No. 2 of December 1874, on the subject of the "Fund for the improvement of Government and certain temporarily-settled estates."

2. In the first place, the inclusion in the forms therewith prescribed of recoveries and payments of road cess in respect of estates of which Government is not the holder, was an error. In such estates payments and recoveries will be made by the proprietors in exactly the same way as in estates the property of private persons, which do not contribute to the Fund. In the revised circular such items have been excluded.

3. Secondly, Government has accepted the proposal of the Board that the calculation of the normal mode of distribution of the assets of the Fund should not be made to depend on road cess considerations, but should be a simple matter of arithmetic, one-half being contributed to roads, one-third to primary education, and one-sixth to miscellaneous improvements. This will necessitate a revision of the order for the calculation of road cess on Government estates. Orders will issue accordingly in the Road Cess Department.

4. Thirdly, the Government of India has decided that the sums allowed to be credited to the Fund shall never appear among imperial receipts, but shall be credited direct. This involves a radical change in the form of the estimates and the mode of treating the assets of the Fund. These are now to be calculated in the manner shewn in Rules 3 and 5.

5. As soon as the amount allotted to Primary Education has been ascertained by the Collector under Rule 8, he will, under Rule 10, transfer it in one sum to the credit of the Magistrate, who will draw against it as required. As it will not be necessary for the Board to check the items of expenditure,* the Collector need take no further action than to see that the credit is not exceeded.

* *Vide* Rule 15.

6. The Member in charge has taken the opportunity to embody the orders of Government as to the constitution of the Fund, and instructions on other points on which experience has shewn the laying down of rules to be necessary.

7. The Government of India in the Financial Department, by orders No. 2668, dated 26th August 1875, sanctioned the transfer of the actual balance of the old Fund for the improvement of Government estates to the present 3 per cent. Fund, but directed that nothing should be credited to the old Fund on account of arrears of revenue collected in 1874-75. The proper percentage on such arrears was to be credited to the new Fund. The percentage was to be reckoned on the actual collections, whether arrears, current, or advance. If any had been done contrary to this, it was to be set right.

With reference to these orders the Member in charge has ascertained from the Accountant-General that the balances of the old Fund at the close of 1874-75 were credited in his office to the new Fund. If in any district these have not hitherto been distributed with the other assets of the new Fund, this should now be done.

8. The following rules should be inserted as section 4 of Chapter VII. of the Board's Rules; the present clause 3, section 3 of that chapter being removed. Clauses 11 and 12 of section 3 should be re-numbered 3 and 4 respectively :—

REVISED RULES.

CHAPTER VII.—SECTION 4.

ESTATES' IMPROVEMENT FUND.

A.

Constitution of the Fund.

1. The Government of India has sanctioned the appropriation to local improvements of 3 per cent. (or in the special case of the Western Dooars one-seventeenth) out of the gross amount of Government revenue paid into the public treasuries on account of all Government estates or ryotwary tracts, and of estates the property of private persons under temporary settlement, at any date subsequent to the 1st April 1874. The appropriation is to be made by direct credit to a distinct local fund, to be called "The Estates' Improvement Fund," and the sums so credited are not to appear in the treasury accounts at all as items of imperial revenue, that is to say, the net revenue, or rent of estates subject to these rules will, after deducting the sums appropriated to the Estates' Improvement Fund alone, be credited as imperial land revenue. It will, of course, be understood that the *demand* for land revenue on Government estates is not to be affected by this subsequent deduction from the collections before they are brought to credit in the accounts. [Columns will be provided in Board's Returns X. and XLI. for the adjustment of the collections to meet this order of Government.]

2. In the case of Government estates and ryotwary tracts, the appropriation came into effect from the beginning of the financial year 1874-75. But in the case of estates the property of private individuals, of which a temporary settlement was in force on 1st April 1874, the assignment will not be made during the currency of the existing settlement, but it will take effect when the lands come under re-settlement after that date.

3. The percentage will, in the case of Government estates, be calculated upon the whole amount of the collections that reach the Government Treasury. No deduction need be made on account of expenses of collection or other charges subsequently and separately disbursed. But where the commission or the pay of the collecting agency is intercepted

y local collecting agents in the interior f districts, the percentage is not to be taken n such intercepted collections. Similarly, n the case of estates the property of individuals, the percentage will be calculated upon he whole amount of land revenue paid into he treasury.

B.

Procedure for ascertaining the Total Assets of the Fund.

4. The Collector will annually prepare a list in the towjih department of his office, in which shall be shown separately each estate or tract liable to contribute to the Fund, and also the following particulars regarding it:—

(1.) Its gross annual demand of revenue or rent.

(2.) Any deductions which the mofussil collecting agency is authorized to make before paying the collections over to the treasury.

(3.) The balance which should annually reach the treasury after such deduction.

(4.) The amount payable to the Estates' Improvement Fund.

Whenever an estate or tract becomes, in the course of any year, liable to contribute under the Government orders, it must at once be added to the list.

5. In Government estates and ryotwary tracts, the *road cess* recoverable from tenure-holders and cultivating ryots will form an asset of the Fund, and the total demand on this account, to be paid in by the settlement-holder or tehsildar, will also be shown against every such estate or tract in the list above prescribed. In the case of estates not the property of Government, no entry on account of road cess will appear in the register, as the owner or manager will pay the amount to the Collector on behalf of the District Road Cess Committee.

Collectors will take care that the amount of road cess which is recovered from tenants in Government estates is duly credited to the Fund, and not diverted to any other head of account, and Commissioners should check this.

6. It will be the duty of the towjih-navis when receiving and checking the chalans of land revenue, to endorse on each chalan from any estate or tract in the above list, the amount to be credited to the Estates' Improvement Fund (calculated at 3 per cent.* on the full amount paid in). He will also distribute the items in his registers thus—(If Rs. 100 be chalanned from any estate in the list)—

* In the Western Dooars one-seventeenth.

	Rs.
Land Revenue	97
Estates' Improvement Fund ...	3
Total ...	100

This distribution of collections will of course not affect either the 'demand' or 'balance' of any estate.

On each chalan of road cess from any estate in the list which is the property of Government, the towjih-navis, or receiving officer, will endorse the order to credit the amount to the Estates' Improvement Fund.

C.

Mode of Distributing the Assets of the Fund.

7. At the beginning of each quarter, the Collector will cause to be prepared a statement shewing the total amount to the credit of the Fund, and will thereupon pass orders distributing the assets of the Fund in manner following.

8. The Collector will first deduct from the total realizations the amount of road cess payable by Government as holder in Government estates and ryotwary tracts. The remainder, after providing for any petty charges for establishment or contingencies, he will then divide into three unequal portions. One-half he will carry to the credit of the District Road Fund (along with the amount of road cess payable by

Government which was first deducted, one-third will be made available for primary education, and the remaining one-sixth will be allotted to miscellaneous local improvements.

9. The amount assigned to roads as a charge against this Fund will be taken credit for at once in the budget estimate of the "District Road Fund" of the district, as "Contribution to roads and communications," and arrangements must be made between the Accountant-General and the Public Works Account Department to make sure that this is properly done. The sum so transferred will be disbursed subject to all the rules of the District Road Fund as to sanction and other points.

10. The amount assigned for "primary education" will be at the disposal of the Magistrate of the District, and be disbursed by him under the rules and orders in force in the Educational Department.

11. There remains the item of "Contribution to local improvements" in each district. The expenditure under this head will be disbursed under the sanction of the Collector for works and projects costing not more than Rs. 50, and of the Commissioner for works and projects costing not more than Rs. 1,000, and under the sanction of the Board for works above that amount. In cases of the latter kind, it must be borne in mind that express sanction to execute the work must be obtained in each instance. The mere fact of the cost of the work being included in the general estimate of the Fund which the Board has passed, will not suffice.

D.

The Budget Estimate of the Fund.

12. Commissioners will submit to the Board at the same time as they submit the provincial budget estimates of each district, *i. e.*, not later than the 15th September, an estimate (in the annexed Forms A1 and A2) of the receipts and charges of the Fund for each district during the ensuing year. The estimate must be supported by a statement in the annexed Form B. When checked by the Board, the estimates will be passed on to the Accountant-General for incorporation in the local funds budget estimate.

13. In preparing the estimate, Collectors will enter on the receipt side all sums which may be expected to be actually realized on account of the Estates' Improvement Fund during the year of estimate, whether paid on account of that year or not. But they will not include sums which are not expected to be collected during the year, merely on the ground that they are on account of that year's demand.

Collectors will note that the year will always open with a balance at credit, being the realizations of the last quarter of the preceding year.

E.

Miscellaneous.

14. The normal mode of distributing the actual assets of the Fund is shown in Rule 8, but the Board may, on the recommendation of Commissioners, sanction any other mode of distribution which local circumstances may render desirable; and when the assets of any estate are less than Rs. 10, the Collector may, without the formal sanction of the Board, allot the whole to roads or otherwise as he may think best.

15. The sums made over to the District Road Fund and for primary education pass away from the control of the Board, and will at once cease to appear in any accounts of the Estates' Improvement Fund. Commissioners are, however, bound to see that the spirit of the Government order is carefully adhered to, which requires that the amount assigned from the revenue paid by each estate shall be expended so as to benefit that estate. It is not intended that

the expenditure shall be actually on the very estate; for instance, an estate may derive great benefit from a road or tank constructed, or a school established, on a neighbouring estate. These remarks apply to all three portions of the assignment.

16. The expenditure on local improvements will, as indicated in Rule 11, remain under the control of the Board; and Commissioners will, when submitting the budget estimates of the fund, submit a separate report describing the projects on which they propose to expend this portion of the allotment.

17. The Accountant-General will prescribe any forms of account that may be considered necessary in his department for giving effect to these rules.

18. The administration of the fund is to be noticed in each Commissioner's land revenue report—(*see* clause 12A, section 6, Chapter XVIII., Board's Rules).

A—1.

LOCAL FUNDS.

Budget Estimate—Receipts for the year ending 31st March 1878.

ESTATES' IMPROVEMENT FUND.

DISTRICT OF

	Estimate.		REMARKS.
	1876-77.	1877-78.	
Voluntary Contributions.			
1.—Assignment calculated at 3 per cent. on proceeds of Government estates and other estates, as shewn in column 5, Statement B, annexed to Board's Circular Order No. 1 of May 1876.			
Miscellaneous Receipts.			
Amount of Road Cess Recoverable.			
2.—From tenants in ryotwary tracts, and all Government estates settled ryotwary.			
3.—From farmers or settlement-holders in all Government estates which have been settled otherwise than ryotwary.			
Total ...			
Estimated balance at the beginning of 1877-78			
Receipts as above			
Total ...			
Payments as per estimate of disbursements at end of 1877-78			
Balance			

A—2.

LOCAL FUNDS.

Budget Estimate—Disbursements for the year ending 31st March 1878.

ESTATES' IMPROVEMENT FUND.

DISTRICT OF

Numbers.			Sanctioned estimate.	Estimate.	REMARKS.
1876-77.	1877-78.		1876-77.	1877-78.	
		Establishment.			
		Clerks			
		Servants			
		Contingent Charges.			
		Stationery			
		Other contingencies ...			
		Printing at private presses ...			
		Miscellaneous.			
		Road Cess payable by Government as holder—			
		(*a*)—On all ryotwary tracts and Government estates settled ryotwary ...			
		(*b*)—On all Government estates settled otherwise than ryotwary ...			
		Contributions to roads and communications ...			
		Contributions to local improvements*			
		Primary education ...			
		Total ...			

B.

Statement to accompany Budget Estimate of the Estates' Improvement Fund for the year 18 .

DISTRICT.	Estimated realizations of revenue from all Government estates, with number of estates.	Estimated realizations of revenue from those of the temporarily settled estates belonging to private individuals, out of which an assignment may be taken under the orders, *i.e.*, all estates of this class which have been brought under re-settlement since the orders making the assignment were passed by Government, and all which may be coming under re-settlement in the year to which the estimates refer, with number of estates.	Total of 2 and 3.	Assignment calculated at 3* per cent. on the amount shewn in column 4.
1	2	3	4	5

* Except in the Dooars, where the calculation will be made at the rate of one-seventeenth of the net revenue.

b

Erratum.

Circular Order No. 5 for April 1876—Below "Hon'ble V. H. Schalch, C.S.I.,*" add "and A. Money, Esq.,* C.B."

Amended Quarterly Return No. X.

No. 2.

AN amended form of Return No. X. will be issued by the Superintendent of the Alipore Jail Press. District Officers are accordingly requested to submit their Returns in the revised form from the first quarter of 1876-77.

Proper Examination of Treasure and Accounts.

No. 3.

A CASE of defalcation of silver and copper coins has lately occurred in a Sub-divisional treasury, arising from a laxity of procedure and inattention to the rules issued for the guidance of officers in charge of treasuries. To prevent the possibility of similar irregularities being committed hereafter, District and Sub-divisional Officers are warned of the necessity for a strict adherence to the rules which have been laid down for their guidance.

2. The irregularities connected with the case were as follow :—

1st.—The cash balance in the treasury was not verified for a whole year, in distinct disregard of Rule 35 at page 10 of the Accountant-General's rules for Sub-divisional treasure-chests, which provides that the cash balance shall be verified by the Sub-divisional Officer once a week.

2nd.—The Treasurer and the Treasury Officers did not examine the cash in hand when they received charge as required by clause 4, section 11, Chapter XI., page 187 of the Board's Rules.

3rd.—Money not belonging to Government was placed in the Treasury for safe custody contrary to clause 6, section 10, Chapter II., page 31 of the Board's Rules.

4th.—The Sub-divisional Officer placed one of his subordinates in charge of the treasury—a duty which he should have kept in his own hands as required by Rule 33 at page 10 of the Accountant-General's rules above mentioned.

5th.—The officer so placed in charge used to hand over his keys to an irresponsible subordinate, and allow him to receive and pay out money, whilst Rule 33 of the Accountant-General's rules requires that the Sub-divisional Officer shall keep the key of one lock with him, and that the ministerial officer acting as Treasurer shall keep the key of the other; and that the treasure-chests shall never be opened except in the presence of the Sub-divisional Officer and the head constable of the guard.

6th.—No proper security was taken from the Treasurer, and his security-bond was not inspected, as required by clause 8, section 2, and clause 7, section 3, Chapter XI., page 174 of the Board's Rules.

7th.—An unnecessarily large balance was allowed to remain at the Sub-divisional treasury, instead of being removed to the sudder treasury, the District Officer having apparently failed to take proper action under Rule 32 of the Sub-divisional Rules, and Board's Circular Order No. 2 for January 1869. These rules were altogether disregarded.

A. MONEY, ESQ., C. B.

Indents.

No. 4.

THE following additions are to be made to Chapter XXII., section 1 of the Board's Rules :—

To clause 6 add—"These indents should be submitted annually, and should be sufficient for a year's consumption."

To clause 16 add—"and should be sufficient for a year's consumption," substituting a comma for the full-stop at the end of the present clause.

Value of Stamps stored in Sub-divisions.

No. 5.

THE following Rule (4A) is added to section 2, Chapter XXI., page 304 of the Board's Rules:—

4A.—In the case of the Sub-divisional Nazir, the value of the stamps to be retained in his store should not exceed thrice the amount of his security, and any balance remaining should be kept by the Sub-divisional Officer under double locks, fresh supplies being given out as needed. But stamps above the amount of the security should only be given out on proof that the average monthly sales require such excess.

HON'BLE V. H. SCHALCH, C. S. I.

Sale-proceeds of Railway Lands.

No. 6.

DISTRICT OFFICERS are informed that it has been ruled by the Government of India, Financial Department, that sale-proceeds of railway (B) and (C) class lands shall be credited to the Public Works Department, and not to "Miscellaneous Land Revenue" as heretofore.

2. Rents of railway (C) lands should, however, be adjusted under the head "Land Revenue, Miscellaneous," as laid down in the Comptroller-General's Circular No. 216 of 21st September 1875. This item of revenue will, therefore, in future, be shown under heading (k), table V., and not in tables II. and III. of Return No. X.

HON'BLE V. H. SCHALCH, C.S.I., AND A. MONEY, ESQ., C.B.

Details of Land Revenue—Excise and Stamp Return.

No. 7.

THE Comptroller-General having prescribed the classifications noted below for the receipts under the heads "Land Revenue," "Excise," and "Stamps," the Board of Revenue, at the instance of the Accountant-General, Bengal, requests that District Officers will be good enough to furnish their Returns and accounts with these details from April last:—

I.—LAND REVENUE.

Ordinary Revenue.

Fixed collections.
Quit-rents of tributary estates.
Sale of Government estates.
Rent of resumed police service lands and service commutations.
Police or thanadaree lands and service commutations.
Sale-proceeds of waste lands and redemption of land tax.

Miscellaneous.

Stone quarry receipts.
Malikana or allowances to excluded proprietors.
Capitation tax.

Miscellaneous Receipts.

Rents of railway class (C) lands.
Rents of buildings situated on such lands.

IV.—EXCISE ON SPIRITS AND DRUGS.

License and Distillery Fees and Duties for the Sale of Liquors and Drugs.

License fees.
Distillery fees.
Still-head duty.
Farm of drugs.
Rent of toddy trees.

d

Net Sale-proceeds of Excise Opium.

Fines, Confiscations, and Miscellaneous.

Fines and confiscations.

Other items.

IX.—STAMPS.

Sale of General Stamps.

One-anna stamps for receipts and cheques, bills of exchange or hoondies.

Other general stamps.

Sale of Court Fee Stamps.

Sale of Plain Paper to be used with Court Fee Stamps.

Duty on impressing Documents.

Duty on unstamped paper.

Duty on insufficiently stamped paper.

Fines and Penalties.

Stamp penalties by judicial officers.

Stamp penalties by revenue officers.

Miscellaneous.

Adjudication fees.

Other items.

A. MONEY, ESQ., C. B.

Stamp Return No. XXXV.

No. 8.

IN submitting annually, in future, Stamp Return No. XXXV., District Officers are requested to report, for the information of the Member in charge, the number of cases in which duty is levied by them under section 24 of Act XVIII. of 1869, as well as the number of cases in which duty is realized by Civil Courts under section 20 of the Act.

New Hydrometer Tables.

No. 9.

OWING to the recent changes in the rates of duty upon country spirits, three new hydrometer tables have been prepared, showing the duty to be levied upon an imperial gallon of spirit when the standard is Rs. 4, Rs. 3½, or Re. 1¾ per gallon, London proof. These tables have been numbered in consecutive order with the existing tables, which will, in future, bear fresh numbers. The new tables are being distributed separately.

2. Rule No. 32 at page 69 of the Board's Rules has been altered as follows :—

32. There is a separate table for each of the nine following standards :—

			Rs.	A.
1.	When the duty upon an imperial gallon at London proof is	...	4	0
2.	When it is	...	3	8
3.	Ditto	...	3	0
4.	Ditto	...	2	8
5.	Ditto	...	2	0
6.	Ditto	...	1	12
7.	Ditto	...	1	8
8.	Ditto	...	1	4
9.	Ditto	...	1	0

3. The following addition is made in Rule 33 :—

For the opening words, "The tables show," substitute "Tables Nos. 1 and 2 show differences of two annas, and the remaining tables."

Counterfoils of Excise Papers in Form 15.

No. 10.

IN the course of a recent inquiry in a certain district to ascertain the cause of a falling-off in excise duty in country spirits, it was discovered that the passes granted under section 27, page 68 of the Board's Rules, had been altered, after their return to the daroga on expiration of their currency, so as to show a smaller quantity of spirit than had actually issued ; and, as the figures in the

counterfoil were intact, it was inferred that they had not been inserted at the time the pass was granted, but that the counterfoils had been kept blank until the return of the passes, and then filled up to correspond with the alterations. It will tend greatly to check fraud of this kind in future if passes, as well as their counterfoils, are forwarded to the Collector's office for scrutiny and comparison with excise forms 17 and 18. The Member in charge therefore directs that the following rule be added as Rule 42A at page 70 of the Board's Rules :—

42A. The counterfoil of passes (form 15) granted under clause 27, as well as the passes themselves, should be forwarded to the Collector, the former on the date of the issue of the pass, and the latter on the date of their return to the daroga after the expiration of their currency, and should be carefully checked and compared in his office with forms 17 and 18. It shall be the duty of the officer in charge of excise to certify every month that he has satisfied himself that the above forms, with the passes and counterfoils, have been punctually submitted and subjected to a careful scrutiny.

JUNE 1876.

HON'BLE V. H. SCHALCH, C.S.I.

Wards' Bills.

No. 1.

DIVISIONAL AND DISTRICT OFFICERS are informed that the Superintendent of Stationery has been requested to print in two parts the form of Wards' Bill as modified by the Board's Circular Order No. 1 of February 1874—one for establishment charges only, and one for charges for postage, stationery, contingencies, and travelling allowance.

2. Indents should accordingly be made on that officer for the two separate forms, which should invariably be used in future.

A. MONEY, ESQ., C.B.

Limit of Tari Possessed or Sold raised from 4 to 12 seers. Exception as regards Pachwai.

No. 2.

SECTION 28, ACT XXI. OF 1856, provides that it shall not be lawful for any person to sell pachwai or tari except under license from the Collector.

2. Section 36 provides that the Collector may demand a tax or duty on every such license granted.

3. Clause 2, section 13, Chapter V., page 72 of the Board's Rules, prescribes how licenses shall be given, and how the tax shall be adjusted. But the restriction imposed by the law is on the *sale* only; there is no prohibition against the manufacture of pachwai or tari for private consumption, provided it is not sold. Section 49 of Act XXI. of 1856, however, read with section 35, makes the mere possession of any greater quantity than four seers of pachwai or tari penal.

4. It has been represented that in the districts in which pachwai or tari is ordinarily consumed, large quantities are used at the festive gatherings, which are common in those districts, at marriages and on other occasions, and that then the people are forced to evade the law limiting the maximum quantity which may be in the possession of a private individual at one time, and it has been said that this leads to harassment

and vexatious interference on the part of the police.

5. To obviate this inconvenience, the Member in charge, after consulting the officers in the districts in which pachwai or tari is mostly consumed, has determined, under the authority of Government No. 151, dated 20th January 1876, to introduce the following relaxation of the restriction imposed by section 35 of Act XXI. of 1856 on the sale and possession of those articles.

6. The following rules are, therefore, added to section 13, Chapter V. of the Board's rules:

5.—The extension of the limit to the sale and possession of tari from four to twelve seers at a time is authorized generally in every district in the Lower Provinces of Bengal.

6.—As regards pachwai, a like extension is permitted generally throughout Bengal, except in those districts (named in the margin) where the practice of brewing pachwai for home consumption prevails. In them persons shall not be allowed to have in possession more than four seers of pachwai except under a special pass granted under the following rules:—

1. Jessore.
2. Nuddea.
3. Moorshedabad.
4. Maldah.
5. Rajshahye.
6. Julpigoree.
7. Darjeeling.
8. Burdwan.
9. Beerbhoom.
10. Midnapore.
11. Lohardugga.
12. Hazareebaugh.
13. Singbhoom.
14. Manbhoom.
15. Shahabad.
16. Sonthal Pergunnahs.

(1.) Any person requiring to have in his possession on any particular occasion any quantity of pachwai in excess of four seers may apply for a special permission to the Collector of the district or Sub-divisional Officer.

(2.) The pass shall be in the following form, and the period for which it is current shall, in no case, exceed seven days:—

FORM No.

[Clause 6 (2), Chap. V., page 73, Board's Rules.]

Pass.

Name of District
Registered No.
Date 187 .

A is authorized to have in possession, for private consumption, pachwai up to twelve seers, either manufactured by him, or purchased from a licensed vendor, on production of this pass, from 187 . 187 to 187 .

Excise Officer.

FORM No.

[Clause 6 (2), section 13, Chap. V., page 73, Board's Rules.]

Pass.

Name of District
Registered No.
Date 187 .

For having in possession more than four seers, and not more than twelve seers, of pachwai from 187 . 187 to 187 .

Excise Officer.

(3.) Passes should be returned to the Collector immediately on the expiration of their currency.

(4.) The pass-holder may either make the pachwai himself (provided, however, that he may not sell it), or may purchase it from a licensed vendor.

(5.) The passes will be issued free of charge.

Evasion of Stamp Law in Loans.

No. 3.

THE attention of Divisional and District Officers is drawn to the following Circular

g.

Order issued by authority of the High Court, on the subject of evasions of the Stamp Law in certain classes of loan-transactions by native money-lenders.

No. 9, dated 12th May 1876.

The accompanying copy of a correspondence regarding evasions of the Stamp Law by native money-lenders in certain classes of loan-transactions is circulated for the information and attention of all Civil Courts:—

From H. LEE, Esq., Acting Assistant Secretary to the Government of Bengal, to the Registrar of the High Court of Judicature, Calcutta, No 1018, dated 13th April 1876.

In continuation of this office letter No. 374, dated the 9th February 1876, I am directed to forward the accompanying copy of a letter* from the Board of Revenue, on the subject of evasions of the Stamp Law in certain classes of loan-transactions by native money-lenders, and to request that the Hon'ble Judges may be moved to direct the issue of the necessary instructions to the subordinate Civil Courts on the points indicated by the Board of Revenue for the prevention of the evasions in question.

* No. 222B, dated 23rd March 1876.

From W. H. GRIMLEY, Esq., Officiating Secretary to the Board of Revenue, L. P., to the Secretary to the Government of Bengal, Revenue Department, No. 222B, dated Fort William, the 23rd March 1876.

In paragraph 69 of the Board's report on the Administration of the Stamp Department for 1874-75, an instance is related of the manner in which the Stamp Laws are evaded by native bankers in loan-transactions. In the case in question, the money-lender was in the habit of advancing money without drawing up a formal bond, but a book was kept by him, made up of a number of loose pages, stitched together with a piece of string. On each page was a loan-transaction thus: I, A. B., have this day borrowed of you C. D., Rs. 100, with interest at 4 per cent. per mensem; signed A. B.; witnesses E. F., &c.; loan to be repaid in such and such instalments; and so on. Each leaf of the book related to a separate loan-transaction, and could be removed at will. In case of default, the book, or leaf of the book, was produced in Court in support of a suit by C. D. against A. B. This is said to be a type of similar transactions of daily occurrence in many parts of Bengal, and it is asserted that Civil Courts frequently give decrees on such informal documents, sometimes without any inquiry as to the absence of a stamp, and sometimes by admitting the document in evidence after payment of penalty-duty under the provisions of section 20 of the Stamp Act (XVIII. of 1869). Either course is apparently illegal. The Member in charge is advised by the Advocate-General that each page of the loan-book, as above described, constitutes a promissory note as defined in section 3, clause 25 of the Stamp Act, and is therefore liable to stamp-duty under article 2 of Schedule I. annexed to the Act. Under section 18, they are not, therefore, admissible in evidence without being duly stamped; nor is it possible to correct the omission of stamp-duty by payment to the Civil Court of penalty-duty under section 20, inasmuch as it is expressly declared in section 28 that the provisions of section 20 do not apply to promissory notes.

2. Mr. Money thinks that it would, perhaps, have some effect in checking evasions of stamp-duty on loan-transactions if the attention of the High Court were invited to the existence of the practice as above described, with the view of such instructions being issued to the subordinate Civil Courts as will prevent the acceptance in evidence of unstamped pages of an account-book in lieu of a sufficiently-stamped pro-

missory note, and also prevent their admission on payment of penalty-duty under section 20 of the Stamp Act.

3. I am further directed to suggest that the attention of Courts may be drawn to the fact that, in very many instances, promissory notes require to be engrossed on paper of a special kind, bearing stamps of a peculiar device. Under section 5 of the Act, all promissory notes, except those chargeable with the duty of one anna, must necessarily be written either on impressed paper, *i.e.*, paper impressed with a stamp, or upon paper upon which the stamp has been denoted in a peculiar manner by the Superintendent of Stamps or the Collector. Two samples, A and B, of impressed paper are enclosed. Specimen A, however, has ceased to be manufactured, and will only continue in use till present stocks are exhausted. A specimen (C) of denoted paper is also enclosed. This paper is denoted by the Superintendent of Stamps, Calcutta, and is sold to the public. The Collector of Calcutta also 'denotes' by means of a circular steel die; but that process is effected after the body of the deed is written, and there is no mistaking it. Consequently, in certain cases a promissory note, inscribed on a leaf of an account book, even though it were stamped with an adhesive stamp, is not admissible in evidence as being duly stamped in accordance with the law."

Evasion of Stamp-duty in Blank Transfer Deeds.

No. 4.

WITH a view to put a stop to the practice which is said to exist of using "blank transfer deeds" in order to evade payment of the stamp-duties chargeable on share transfer deeds, the following instructions are issued for the information and guidance of the Revenue Officers concerned.

2. Whenever a share transfer deed is taken to the Collector's* office to be stamped by the process called "denoting" under the provisions of section 5 (*b*) of the General Stamp Act, XVIII. of 1869, it shall be the duty of the Collector to require the following particulars to be shown in the deed before affixing the proper stamp thereto, *viz.*, the date of the transfer, the names of the parties, *i. e.*, the transferor and transferee, the amount of the consideration-money, the number of the shares conveyed, and a description of them. The instrument, however, should not be executed or signed by the transferor or transferee till after the stamp has been affixed.

JULY 1876.

HON'BLE V. H. SCHALCH, C. S. I.

Corrections of cl. 4, s. 4, Ch. XXV., page 342, Board's Rules—Attached Estate—Manager's Agreement.

No. 1.

The following alteration and addition should be made in clause 4, section 4, Chapter XXV., page 342 of the Board's Rules :—

For the words "is required by law to," in line 3, substitute the word "shall," and after the word "trust," in line 5, add the words "and shall take an agreement from such person in the form given in the appendix."

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* *N. B.*— Under Government Notification No. 1510, dated 14th March 1871, published at page 603 of the *Calcutta Gazette* of 22nd March 1871, the power of "denoting" can be exercised in Lower Bengal by the Collector of Calcutta and the Superintendent of Stamps, Calcutta, only, but practically it is only exercised by the former.

APPENDIX.

[*See section 4, clause* 4.]

FORM OF AGREEMENT TO BE EXECUTED BY A MANAGER OF AN ATTACHED ESTATE.

I, A. B., having voluntarily taken on myself the management of the
attached estate, do hereby engage with the Collector of that I will manage the said estate diligently and faithfully, will collect the rents and discharge the public revenue, and will use every means in my power to provide for the cultivation and improvement of the estate, and will act in every respect for the interest of the proprietors in the same manner as if the estate were my own. I will derive no personal advantage from the management beyond the remuneration granted to me as manager, and I will keep up a full and just account of all receipts and disbursements during the period of my management. In the event of any breach of trust, neglect, or omission as manager being proved against me, I will pay to the said Collector Rs.
as liquidated damages.

Registration of Currency Notes under Rs. 50 not compulsory—C. O. No. 9 of July 1871 cancelled.

No. 2.

UNDER paragraph 7 of the Comptroller-General's No. 215, dated 23rd August 1875, circulated with the Accountant-General's No. 346, dated 21st September 1875, Currency Notes of less than Rs. 50 in value need not be registered in future.

2. The following alterations and additions are accordingly made in the Board's Rules:—

Clause 7, section 6, Chapter II., page 25.—For the words "A Register," in line 1, substitute the words "Two Registers of notes of Rs. 50 and upwards." word "is," in line 2, substitute "are," and after the words "Form in line 3, add the words "one for the home, the other for notes circles."

Clause 8, section 6, Chapter 26.—For the words "in the Re the paragraph added to this clau Board's Circular Order No. 3 of M read the words "in each Register."

Section 4, Chapter XIV., A Abstract Register (No. 79, A).— the words "100 Rs." and "50 line 9, insert the word "and," and words "20 Rs. and 10 Rs."

3. The Board's Circular Order July 1871 is hereby cancelled.

A. MONEY, ESQ., C.B.

Caution against granting Hotel Lice Excise Shops.

No. 3.

THE following is added to the r the settlement of excise shops un auction system:—

26. Under clause 5, section 5 Board's Rules, the fee for hotel lic fixed at Rs. 100 per annum. Ven liquor will, therefore, sometimes fi their interest to conceal the real char their business, and to take out a license instead of an ordinary retail for a shop, in order to avoid payn auction rates, of a higher sum than l and the Government revenue will in

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hence suffer. The Collector should therefore be on his guard against granting hotel licenses except for houses which are *bonde* places for the lodging and entertainment travellers. On discovery of the existence any hotel license improperly obtained in e manner above described, the Collector ll be at liberty to re-settle at auction the op which the license covers.

Receipts for sums over Rs. 20, except those granted to Cultivators for Rent, must have a One-anna Stamp. The Postage Stamp on a Receipt sent through Post is not enough.

No. 4.

It has been brought to the notice of the ember in charge that the provisions of the eneral Stamp Act as regards the necessity r affixing receipt stamps to acquittances for ms of money above Rs. 20 are very frenently disregarded, and that some misconcepon exists as to the precise purport of those ovisions. As a case in point, it was rently contended by a Calcutta firm, in cuse for an omission to furnish a stamped ceipt for a remittance from the mofussil, at an unstamped acknowledgment is all at is required by the Stamp Act in cases here the acknowledgment is forwarded under amped cover by Post. In order to remove erroneous an impression, and to make e provisions of the law more widely nown, the Member in charge directs the sue of the following notification by publition in the *Calcutta Gazette*, and by tensive circulation in each district, both English and the language of the district :—

NOTIFICATION.

No. 858B.

Dated the 25th July 1876.

It is hereby notified for general information that under article 7, Schedule II., Act XVIII. of 1869, the receiver of any sum of money exceeding Rs. 20 in satisfaction of a debt, who is required to give a receipt, must affix to it an adhesive stamp of one anna; and that, if he should give such receipt without the same being duly stamped, he is liable to a fine not exceeding Rs. 100. It is also notified that the Magistrate has power, under section 38 of the Act, to reward any informer of an infraction of the above rule by giving him a sum of money not exceeding half of the amount of fine imposed by such Magistrate on the offender.

A receipt, however, granted to a cultivator for the rent of land paying revenue to Government is exempted from stamp-duty.

AUGUST 1876.

Hon'ble V. H. Schalch, C.S.I.

Corrections in Return No. X.

No. 1.

The following corrections should be made in the instructions at head of Tables II. and III. of the revised form of Return No. X:—

Table II., Instruction 2, *for* "Cols. 7 and 16," *read* "Cols. 7, 8, and 20."

Table II., Instruction 4, *for* "Cols. 3 and 12," *read* "Cols. 3 and 16."

Table II., Instruction 4, *for* "Col. 11," *read* "Col. 15."

Table III., Instruction 3, *for* "E Col. 11," *read* "E Col. 15."

A. MONEY, ESQ., C.B.

Fraudulent Use of Postage Stamps.

No. 2.

IN continuation of the Board's Circular Order No. 2 of November 1875, all Revenue Officers in the Lower Provinces are informed that mere ordinary cases of the fraudulent use of postage labels, such, for instance, as the use a second time of an obliterated label, need not be especially reported to the Government of India, unless there is some peculiarity about the case which makes it important. The discovery of any *forged* postage labels should be immediately reported.

Telegrams to Board.

No. 3.

ALL officers who may have occasion to telegraph to the Board are requested to use the abbreviation—

"Revenue Board"

for

"Secretary to the Board of Revenue."

Distillery Accounts.

No. 4.

THE following rule is added as 40A at page 70, section 11, Chapter V. of Board's Rules:—

40A. The forms for the above acco and statements are bound up in books, w are issued, as required, to the officer charge of distilleries. Before issue, page should be numbered, and each le tested by the initials, clearly written, o officer in charge of excise; and the last of each book should specify the total nu of pages contained in it also in the l writing of the same officer.

The entries in the registers shall be tinued from one year to another unti volume is completed. The darogahs sl sign each page after completing the e in it.

Selling Rate of Excise Opium.

No. 5.

THE following changes have been with the sanction of Government i selling price of excise opium, with from August 1876:—

Division.	District.	Selling price p Present.	Sanct
		Rs.	R
Burdwan ...	Midnapore	24 ...	
Orissa ...	Cuttack	25 ...	
	Pooree	25 ...	

2. The rates in the remaining di will continue as at present.

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